SUPREME COURT OF THE UNITED STATES.

No. 197—OCTOBER TERM, 1881.

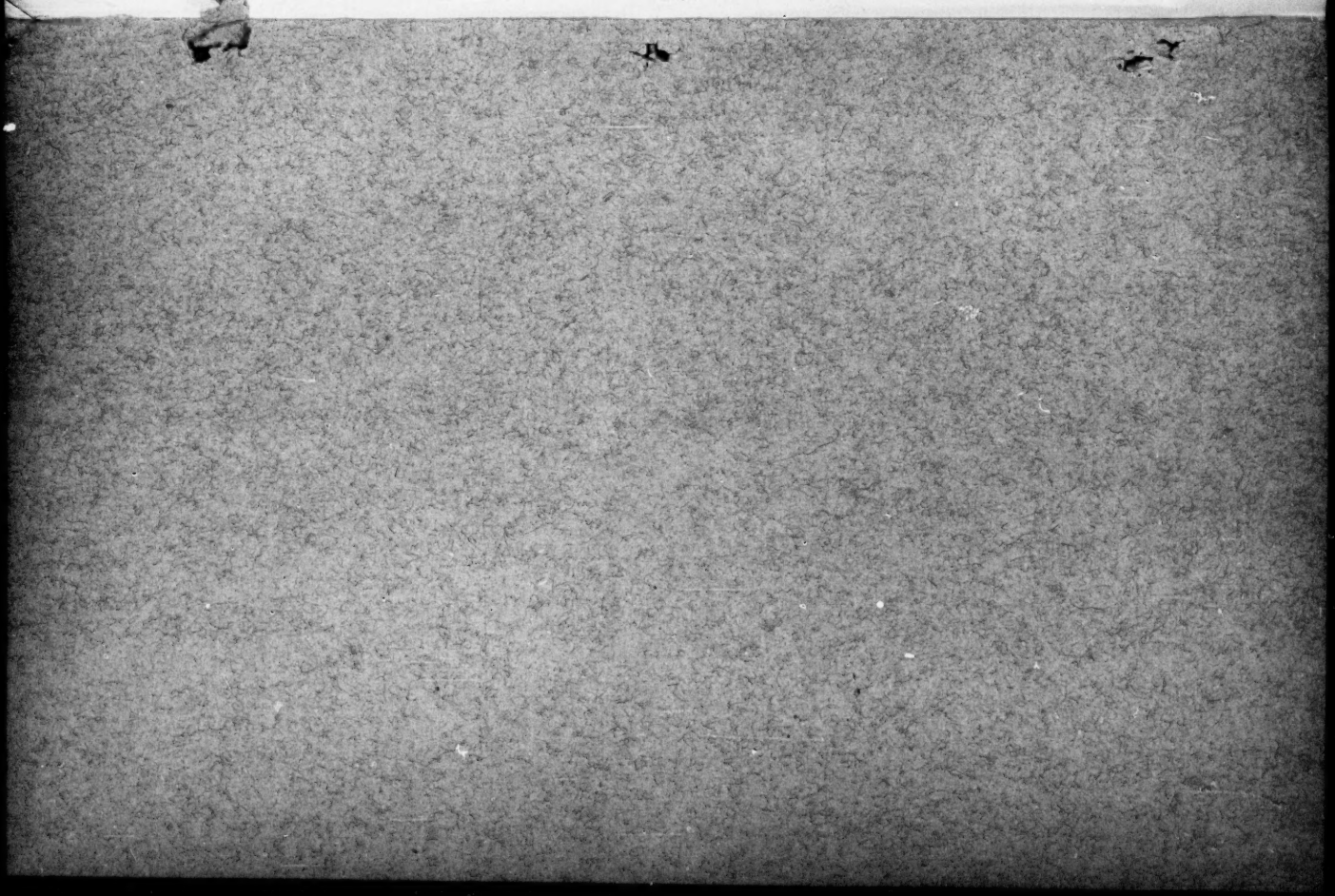
JOHN N. CUSHING ET AL, APPELLANTS,

vs.

JOHN LAIRD, THE YOUNGER,

FOSTER & THOMSON, GARNISHEES.

APPELLANTS' BRIEFS.



Supreme Court

OT THE UNITED STATES.

JOHN U. CUSHING, *et als.*,
Appellants,

vs.

JOHN LAIRD, THE YOUNGER,

FOSTER & THOMSON,
Garnishees.

APPELLANTS' BRIEF ON THE JURISDICTION.

There is first to be considered, on the hearing of this case, a question of practice, which comes up on the denial by the Circuit Court of a motion by the libellants to dismiss the appeal from the decree of the District Court.

The facts which present this question appear as follows on the record:

On the libel which was filed, process with a clause of foreign attachment issued. (Record, p. 14.)

The garnishees named in the attachment appeared and filed an answer (p. 20). A hearing was had on the issue raised by that answer; and the District Court, on April 26th, 1873, made a decree against the garnishees (p. 168).

It thus appearing by this decree of the District Court that that Court had obtained jurisdiction over the respondent Laird, the libellants proceeded to an interlocutory decree by default against Laird (p. 169), and subsequently to a final decree, which was entered on the 19th day of September, 1873, and is found at p. 171 of the record.

The garnishees, named in the original process, served notice of appeal from this decision against Laird (p. 172), and perfected an appeal by giving a bond on appeal (p. 172), and filing their petition of appeal (p. 174).

This appeal coming on to be heard before the Circuit Court, the libellants "moved to dismiss the appeal for irregularity and for want of jurisdiction in the Court to entertain the same." (Bill of exceptions, p. 179, and record 257.)

This motion the Court finally denied (Decree, p. 258), and the libellants excepted to this denial (p. 221).

On the above facts the libellants now urge before this Court that this denial was error; that the appeal of the garnishees from the final decree against Laird should have been dismissed, and that this Court should remand this cause to the Circuit Court, with directions to reverse the decree entered on such appeal, and to enter a decree dismissing such appeal from the final decree against Laird.

And on this question we present the following points:

FIRST.

We suppose that it will be conceded that an appeal from a decree cannot be taken by one who

is a stranger to the decree. It is only the party to a decree who can appeal from it.

SECOND.

We insist that these garnishees are not parties to this decree of the District Court.

The decree is a decree against John Laird, and against him alone.

It would have been a perfect decree if it had closed with the word that "the libellants have execution thereon to satisfy this decree."

The addition of the words "against the property of this respondent, and especially against his property, credits, and effects, in the hands of Foster & Thomson, garnishees," does not make Foster & Thomson parties to the decree, any more than the addition of the words, "and especially against the respondent's horse in the livery-stable of John Doe," would make either the horse or John Doe a party to the decree.

It is to be noted that the decree does not specify any particular property, credits, and effects in the hands of the garnishees. It only gives execution against "his (the respondent's) property."

It does not determine what such property, credits, and effects were, or specify any amount whatever of property, credits, and effects. Whether there was any property, credits, and effects of John Laird's in the hands of the garnishees is left to be fixed by some other decree.

The decree is only a decree that the libellants shall have execution against the property of John Laird.

How can Foster & Thomson have any standing, right, or interest to appeal from that decree?

THIRD.

If it can be argued that the mention of Foster & Thomson's name in the decree makes them parties to the decree, it must be that they are *joint parties* with John Laird. He was directly affected by every part of this judgment. There is no severance as between Laird and the garnishees. It is only against *his* property in *their* hands that the libellants are to have execution.

It is only by a strained construction of language that the garnishees can be considered as parties to the decree at all. If they are such parties they must be joint parties, for every part of this clause of the decree affects Laird certainly as much as them.

FOURTH.

But an appeal by one of joint defendants is never allowed.

If this decree could be appealed from at all, it must have been by a joint appeal by all the parties to it.

This is settled in this Court by a series of cases:

Williams vs. Bank, 15 Wheaton, 414.
Owings vs. Kincannon, 7 Peters, 402.
Masterson vs. Herndon, 10 Wall., 416.
The Protector, 11 Wall., 82.
Simpson vs. Greeley, 20 Wall., 156.

FIFTH.

An appeal from that decree of the District Court therefore could only be taken by Laird (if, as we

claim, it was a decree against Laird alone), or by Laird and Foster & Thomson jointly, if it were a joint decree against both.

In either case, therefore, the Circuit Court erred in refusing the motion of the libellants to dismiss the appeal taken by Foster & Thomson alone from the decree of the District Court.

The case in this aspect is similar to the case of Mordecai vs. Lindsay (19 How. 199), in which this Court says: "All that we can do in the case, as it stands here, is to reverse the decree of the Circuit Court dismissing the appellants' libel, to send the case back to the Circuit Court, that the appeal in it may be dismissed by it for want of its jurisdiction, leaving the case in its condition before the appeal to that Court."

SIXTH.

The reason of things leads to the same conclusion. On an appeal from that decree of the District Court Laird could bring up for consideration before the Circuit Court only the questions whether the allegations of the libel are sufficient to support the decree.

Masterson vs. Howard, 18 Wall, 92.

But those allegations do not bring up the questions which the garnishees sought to have passed upon by the Circuit Court.

These questions arise on the answer of the garnishees, which answer is no proper part of the apostles on an appeal from that final decree.

Supreme Court Rule, 53.

How could the garnishees bring before the Circuit Court, by appealing from that decree, questions which Laird could not raise?

The reasoning of the Circuit Court (p. 207) appears to be this:

> "The final decree as against garnishees, from which they can appeal, is a decree that the money in their hands be paid to the libellants.
>
> "There was no decree that this money be paid to the libellants until the decree of Sept. 19 ordered the money in the hands of the garnishees to be paid to the libellants.
>
> "Therefore the decree of Sept. 19 was the final decree."

But we controvert both the premises.

1. The final decree as against garnishees in these proceedings under the rules of the District Court is not a decree that they pay the money to the libellants, but that they pay it into Court.

District Court Rule, 30.

2. The decree of Sept. 19 does not decree that they pay any money to the libellants.

The premises both being erroneous, we submit that the conclusion must fall.

J. LANGDON WARD,

Proctor for Appellants.

ROBERT D. BENEDICT,

Advocate.

Supreme Court

OF THE UNITED STATES.

JOHN N. CUSHING, *et al.*, *Appellants*, *vs.* JOHN LAIRD, THE YOUNGER, FOSTER & THOMSON, *Garnishees.*	No. 197.

APPELLANTS' BRIEF ON THE MERITS.

History of the Case.

This is a cause of spoliation and damage, civil and maritime. Suit was commenced on the 16th day of September, 1868, by the filing of the libel and the issue of process.

Attempt was made to compel the appearance of the respondent by process of foreign attachment, and certain moneys, known as the "proceeds of the steamer *Wren*," were attached in the hands of Foster & Thomson, garnishees.

The libel is found at fols. 1–2; the process at fol. 3; the return of the Marshal at fol. 4.

On the 29th of September, 1868, an amended libel was filed (fols. 6–7), and a supplementary process issued (fols. 8–9); the Marshal's return is found at fol. 9.

On the 17th May, 1869, Mary A. Johnson *et al.* filed their petition to be made co-libellants in the cause (fols. 176–178), the prayer whereof was granted (fol. 11), and on the same day a reamended libel (fols. 12–13), was filed, on which supplementary process was issued (fols. 14–15), to which the Marshal's return is found at fol. 15.

On the 26th of June, 1869, the garnishees moved to discharge the attachment against them. The notice of motion is at fol. 19, the affidavit served with it at fol. 18.

Hearing being had on this motion on the 27th November, 1869, an order was made (fol. 17) allowing amended returns to be made to the several processes, which was done. The amended returns are found at fols. 4, 9, and 16.

The garnishees thereupon renewed their motion on the same papers, and on the 2d April, 1870, an order was made (fols. 19–20) allowing amended returns to the several processes to be filed, and denying the motion.

The opinion of the District Judge on deciding this motion may be found in

4 Benedict's Dist. Ct. Reps., pp. 72 *et seq.*

Amended returns to the several processes were filed in accordance with this order (see fols. 4, 10, and 16). On the 12th of April, 1870, the garnishees filed their answer (fol. 20), to which the libellants excepted (fol. 22).

These exceptions having been argued on the 30th May, 1870, an order was made (fols. 23–24) allowing the first and second exceptions and disallowing the third, leaving the answer of the garnishees a simple denial of the possession of funds belonging to the respondent. Thereupon the libellants on that day filed interrogatories to be propounded to the garnishees (fols. 25–26).

To these interrogatories the garnishees excepted (fol. 27), and, said exceptions having been argued, on the 28th June, 1870, an order was entered (fol. 28), allowing

some of said exceptions and disallowing others, and directing the garnishees to answer the interrogatories.

On the 6th October, 1870, the garnishees filed their answers (fols. 30–34) to said interrogatories, to which the libellants excepted (fols. 35–37), and the said exceptions having been argued, were overruled (fol. 38).

On the 6th November, 1872, the issue raised by the answer of the garnishees, to wit, whether or not the garnishees had, or since the 16th day of September, 1868, had had, in their possession or under their control, funds belonging to or which they could not be permitted to deny belonged to John Laird, the younger, the respondent, was brought to a trial.

The minutes of the trial, evidence, and exhibits are found at pp. 38–168.

The Court, after advisement, on the 8th April, 1873, rendered an opinion (see 6. Benedict's Dist. Ct. Reps., 445), which is appended to this brief, whereupon, and on the 26th day of April, 1873, an order was entered (fols. 168–169), ordering, adjudging, and decreeing that, at the time of the levy of the attachments herein, the garnishees did have in their hands credits and effects of the respondent, to wit, the proceeds of the steamer *Wren*, amounting to $31,441.67.

Afterwards, and on the same day, the District Court made its decree directing the garnishees forthwith to pay into court the sum so decided to be in their hands belonging to the respondent, or give stipulation with sufficient surety to abide the further order or decree of the court in relation thereto. (Fol. 169.)

On the 29th April, 1873, the District Court entered an interlocutory decree and order of reference against Laird by default, as of April 26th, 1870. (Fol. 170.)

A reference was had, the libellants' damages were assessed, the Commissioners' report was confirmed, and on the 19th of September, 1873, a final decree was entered against Laird for $143,749.16 damages and costs, for which execution was awarded the libellants "against

his property, and especially against his property, credits, and effects in the hands of Foster & Thomson, garnishees." (Fols. 171–2.)

From this decree Foster & Thomson appealed to the Circuit Court. The notice of appeal is found at fol. 172, and the petition of appeal at fols. 174-176.

On the 29th May, 1878, the cause came on to be heard in the Circuit Court on this appeal. (Fol. 179.)

The counsel for the libellants read among other things the transcript of the record in the case in the Supreme Court of the United States entitled "The Steamship *Wren* and cargo, Edward C. Stiles, Master and Claimant, *vs.* The United States;" the briefs of counsel on both, sides in the same case; an exemplified copy of the record in the District Court of the United States for the Southern District of Florida, in a cause entitled "The United States *vs.* The Steamer *Wren*," including the proceedings had before and after the appeal to the Supreme Court; the record in the same Court, in a cause entitled John N. Cushing *et al. vs.* John Laird, the younger; and a letter from Foster & Thomson to J. Langdon Ward, dated February 24, 1869—all as they were contained in the apostles transmitted from the District Court to the said Circuit Court in this cause, and the opinion of the Supreme Court of the United States, in the case of "The *Wren*" as it is found in 6 Wallace, 586, etc.

At this trial the counsel for the garnishees read the evidence of James Thomson, as contained in the apostles transmitted from the District Court, subject to the objection by the libellants that the record already in evidence was an estoppel, and showed that they had received the money (the proceeds of the sale of the steamer *Wren* and cargo), as the money of Laird, and were estopped by their subsequent action from showing it was not the money of Laird. (Fol. 181.)

Counsel for the garnishees also read a bill of sale of the *Wren* from Laird to Charles K. Prioleau, dated

January 3d, 1865, subject to the same objection (fol. 181).

These objections were overruled (fol. 213), and the libellants duly excepted. (Fol. 221.)

Counsel for the garnishees at this trial also moved for leave to amend their answer (fols. 181–2), which was granted, subject to final decision, and then allowed, to which the libellants duly excepted. (Fol. 183.)

Counsel for the garnishees then offered in evidence certified copies of papers from the files of the State Department. (See Ex. A, fols. 221 to 256.)

Counsel for the libellants objected that the evidence was immaterial to the issues raised by the pleadings (as they stood at the commencement of the trial), and that it had not been properly taken under the rules of the Court to be admissable.

These objections were overruled and the libellants duly excepted (fols. 181–2–3).

The minutes of the proceedings on this trial are found at fols. 179–183.

The findings of fact proposed by the libellants to the Circuit Court are at fol. 183 *et seq.*

The conclusions of law proposed by the libellants to the Circuit Court are at fols. 191–2.

On the 13th September, 1878, the Chief Justice, who presided at the Circuit Court, made and filed findings of fact (fols. 192–206) and conclusions of law (fol. 206), and rendered and filed an opinion (fols. 206–215). And thereupon the libellants requested said court to make certain additional findings of fact (fols. 215–217), of which requests some were refused, one was granted, and one *was refused as immaterial.* To each of which refusals the libellants duly excepted.

On the 4th October, the libellants duly served and filed exceptions to the findings of fact and conclusions of law made and filed by the said Justice, and to his refusal to make the findings of fact and conclusions of law submitted by them (fols. 217–221), and on the 12th October, 1878, prepared and settled their bill of excep-

tions, which was allowed by the Chief Justice and ordered on file (fols. 179–221).

Thereupon, and on the 29th January, 1879, a decree was entered in this cause in the Circuit Court substantially reversing the decree of the 19th September, 1873 (fol. 259).

From this decree the libellants appealed to this court. Their appeal is found at fol. 260.

The citation is at fol. 264.

Statement of Facts.

The findings show:

1. That in May, 1869, Foster & Thomson, these garnishees, received from the registry of the District Court of the United States for the Southern District of Florida $31,441.67, which were the proceeds of the steamer *Wren*.

Pages 203-205.

2. That the *Wren* was libelled in said court as prize on the 16th June, 1865, was claimed by one Edward C. Stiles, her captain, as bailee of, and for, and on account of John Laird, the younger, as her "true and *bona fide*" owner, June 26, 1865; was condemned as prize, as enemy property, August 15, 1865; and that an appeal from such decree was thereupon, on the same day, taken to the Supreme Court of the United States.

Pages 192, 193, 196.

3. That at or about this time these garnishees, who were attorneys-at-law, were employed by Charles Kuhn Prioleau, a member of the firm of Frazer, Trenholm & Co., to protect his interests in the matter.

Page 194.

4. That they forthwith procured the transmission of the record to the Supreme Court; retained additional counsel; procured for and delivered to him a copy of the record; that no additional testimony was taken, and no change in the pleadings made or applied for.

Page 196.

5. That upon the argument of the appeal the government insisted that it appeared from the evidence that the steamer was the public property of rebel enemies at the time of the capture, and in support of this position reference was made to the testimony of witnesses, who swore that Frazer, Trenholm & Co. were the owners.

Pages 196–197.

6. That on said argument the counsel, whom these garnishees had retained, contended that the evidence was conclusive that she was "the property of a British neutral, evidently referring to Laird."

Page 197.

7. That the decree of condemnation was reversed by the Supreme Court at the December term, 1867, and as the opinion shows, on the ground that the question being whether the vessel was the property of enemies of the United States or not, she was proved to be the property of Laird, a British neutral.

Page 197.

8. That, on the 5th January, 1869, these garnishees retained one F. A. Dockray to attend to such further proceedings as might be necessary in the Florida Court to secure the proceeds of the *Wren*, representing to him that Laird was the owner of the vessel, and giving him to understand that he was retained for Laird.

Pages 215, 216.

9. The garnishees at this time had a power of attorney from Laird under which they were acting, which they had forwarded to the Florida Court, and of which they advised Mr. Dockray.

Pages 197, 216.

10. That, pursuant to such retainer, Dockray, on the 13th April, 1869, filed the mandate of the Supreme Court in the District Court in Florida, and filed also the power of attorney from John Laird, the respondent herein, to Foster & Thomson, and, on the 8th May following, as attorney for said Laird, moved for a final decree in accordance with said mandate. That thereupon a decree was entered awarding restitution to Laird, the claimant, and directing the proceeds of the vessel in the registry of the court to be paid to these garnishees as Laird's attorneys in fact; whereupon checks for $29,869.62 and $1,572.00, respectively, were drawn to their order, and delivered to and receipted for, on their behalf, by Dockray, as attorney for these garnishees, in the capacity of attorneys in fact for Laird.

Pages 202, 203.

11. That, on the 28th day of December, 1868, certain of the libellants in this cause filed, in the District Court of the United States for the Southern District of Florida, their libel against John Laird, the younger, for the same cause of action as that here urged, upon which libel process of attachment was, on the 20th February, 1869, issued against the proceeds of the *Wren*, then in the registry of the court, which were thereupon attached.

Pages 200, 201.

12. That, on the 5th January, 1869, these garnishees retained F. A. Dockray to appear on behalf of Laird in that suit, and move to set aside the process, deprecating,

it is true, any general appearance for reasons given, and suggesting only a special appearance.

Pages 215, 216.

13. That, on the 24th February, 1869, these garnishees, to avoid litigation in Florida, agreed with the proctor for these libellants to draw the proceeds of the *Wren* under their "authority from the *claimants*, Laird and Stiles," and hold the same long enough to enable him to serve such process as he might be advised; the intention being to transfer the litigation to the Southern District of New York without changing the position or rights of the parties.

Pages 201, 205.

14. That, acting thereupon, the proctor for these libellants directed his correspondents in Florida to allow the proceeds to be withdrawn from the registry of the court and forwarded to Foster & Thomson.

Page 202.

15. That, thereupon and on the 8th of May, 1869, Dockray entered a general appearance for Laird in the personal action, the attachment therein was dissolved, and the checks for the money were received by him as attorney for these garnishees as Laird's agents, and forwarded to them on the 10th May, 1869.

Pages 202, 203.

16. That, on the 11th May, 1869, he addressed them a letter, giving them a full account of the means he had employed to secure the money (including his appearance for Laird) and enclosing a certified copy of the proceedings in the personal action, which letter they received in due course of mail.

17. The title of Prioleau to the proceeds of the *Wren* in question, which is set up by the garnishees, is claimed

under a bill of sale from Laird to him, executed and delivered on the 3d January, 1865, ten days after the original registry of the *Wren*, and more than five months before she was captured, which was on the 13th June, 1865.

Page 192.

STATEMENT OF ERRORS.

The Circuit Court erred:

1. In denying the motion of the libellants to dismiss the appeal (fols. 179, 258).

2. In overruling the objection of the libellants to the testimony of James Thomson (fol. 181).

3. In overruling the objection of the libellants to, and allowing the reading of, the bill of sale of the *Wren* to Charles K. Prioleau, dated January 3d, 1865, and the certified copy of the registry of the "*Wren*," and entries on the face of such register of such bill of sale (fol. 181).

4. In overruling the objection of the libellants to the reading of the evidence contained in Exhibit A (fol. 181, 183).

5. In finding, as a conclusion of law, that "as Prioleau was in fact the owner of the *Wren* at the time of her capture, he was in law the owner of the proceeds in the registry of the Court after her sale (fol. 206).

6. In finding, as a conclusion of law, that "the sentence of acquittal in the prize cause * * * left the owners free to assert their rights as against the world" (fol. 206).

7. In finding, as a conclusion of law, that "the decree in the prize suit did not adjudge the fund to Laird as owner, or deprive Prioleau of his interest" (fol. 206).

8. In finding, as a conclusion of law, that "as Laird was not the real, but only the apparent owner of the fund, he would have taken it, if payment had been made to him, in trust for Prioleau" (fol. 206).

9. In finding, as a conclusion of law, that "Foster & Thomson, as his agents, hold it upon the same trust, and are not accountable to the libellants in this action" (fol. 206).

10. In finding, as a conclusion of law, that "the decree of the District Court requiring Foster & Thomson to pay the fund into court and subjecting it to the payment of the amount found due the libellants from Laird was wrong, and should be reversed" (fol. 206).

11. In refusing to find as immaterial the fact "that on the argument of the prize cause in the Supreme Court, the counsel for the appellant therein asserted that the facts were that 'the steamer was built by Messrs. Laird, at Birkenhead, England, in 1864, and her certificate of registry is dated December 24th, 1864, and she was owned by John Laird, of Liverpool. She was never sold or transferred, and was owned by Laird, the younger, on the day of her pretended capture, and that the steamer had no guns and no cargo whatever.' She was on her way under English colors from Havana to Liverpool, to be delivered to her owner, Mr. Laird, an Englishman and an English subject," as requested by the libellants (fol. 217).

12. In refusing to find, as conclusions of law, the several conclusions proposed by the libellants, (fol. 191, 192).

13. In making so much of the decree in this cause as begins with the words, " It is further ordered, adjudged, and decreed by the Court," on page 258, down to and including the words, "so as to operate as a supersedeas," on page 259 of the record.

POINTS.

FIRST POINT.

The question now before this court is whether on the above facts John Laird, the younger, was, *quoad* this action and these libellants, the owner of the proceeds of the *Wren* when they came into the hands of these garnishees, as the District Court held; or whether the garnishees are at liberty to assert an ownership of them by Prioleau, as the Circuit Court decided.

The libellants insist that Laird was the owner, and, to sustain their position, rely mainly upon the record evidence of the judgment in the Prize Court.

In considering this evidence two questions arise, namely:

1. What did that Court decide.
2. What is the effect of that decision.

SECOND POINT.

As a preliminary to determining the proper answer to the first question, "What did the Court decide?" a

brief exposition of the nature and course of prize proceedings; of the questions arising in prize causes, and of the rights and obligations of parties thereto seems necessary. The more so, in view of, as we believe, the singular misapprehension into which the learned Chief Justice, who decided this cause in the court below, has fallen.

At the outset of this discussion, inasmuch as extensive quotation is made, and reliance placed upon Justice Story's "Notes on the Principles and Practice of Prize Courts" in 1st and 2d Wheaton, reprinted in England, under the title of Pratt's Prize Practice, we deem it proper to call the attention of the Court to the approval of Judge Story's work in England and this country.

"Story's Notes on the Principles and Practice of Prize Courts." A work that has been selected by the British government for the use of its Naval Officers as the best code of instruction in the prize law.

11 Moore's Privy Council, 145.
The *Georgia*, 7 Wall., 41.

a. A prize proceeding is a proceeding *in rem.* A prize court *cannot* act until it has possession of the property. In the words of Chief Justice Marshall:

"The proceedings of that court are *in rem.*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest."

Jennings *v.* Carson, 4 Cr., 23.

b. Accordingly, the first thing done by the captors on arriving in port is to place the property in the

custody of the court, and to deliver to the court all the papers and documents found on board the captured vessel.

Upton on Prize, p. 248.
Betts Adm., p. 72.
Pratt's Prize Pr., p. 46.

c. As soon as possible thereafter the master, principal officers, and some or all of the crew of the captured vessel are examined upon the standing interrogatories (called the examination *in preparatorio*). At this examination counsel are not permitted to be present, and the witnesses are examined separately, and not in the presence of each other.

Betts' Adm., p. 72.
Upton on Prize, p. 249.
Pratt's Prize Pr., p. 16.

d. As soon as the examinations are completed they are sealed up and lodged with the proper court, and, with the papers found on the captured vessel, *are not permitted to be seen or examined by any one* until after a *claim* is made and test affidavit put in.

Pratt's Prize Pr., p. 20.
Prize Rule 11, S. D. N. Y.
The San Jose Indiano, 2 Gall., 267.
Upton, 257. The *Port Mary*, 3 Rob., 233.
3 Phill. Int. Law, 708.

e. Pending the examination *in preparatorio* the captors may file their libel. The libel is and always ought to be the mere general allegation of prize, such as is used in undoubted cases of hostile property. The captors are not called upon to state, at the commencement of the suit, the particular grounds on which they contend she is so.

Pratt's Prize Pr., p. 49.
The *Adeline*, 9 Cr., 244.
The *Fortuna*, 1 Dod., 81.
The *Andromeda*, 2 Wall., 490.

f. Upon filing the libel a monition issues, citing all persons who are interested to appear at a given day and show cause why the property should not be condemned as prize.

Betts' Adm. Pr., 73.
Prize Rule, 24.
Pratt's Prize Pr., 49.

g. At the return day of the process, if no *claim* is at that time, or has been previously interposed, and upon proclamation made, no person appear to claim, the default is entered on the record; and the *court* will then proceed to examine the evidence; and if proof of enemy's property clearly appear, it will immediately decree condemnation; if the case appear doubtful it will postpone a decision. It is not now usual to condemn goods for want of a claim till a year and a day have elapsed after the service of process, except in cases where there is a strong presumption and reasonable evidence to show that the property belongs to an enemy. And if no *claim* be interposed within that period, *the property is condemned, of course*, and the question of former ownership is precluded for ever, the owner being deemed in law to have abandoned it.

Pratt's Prize Pr., 50–51.
Betts' Adm., 76.
The *Staadt Embden*, 1 Rob., 26–29.
The *Henrick and Maria*, 4 Rob., 43–44.
The *Harrison*, 1 Wheat., 298.
The *Avery*, 2 Gall., 386.
The *Carolina*, Marriott's Formulary, p. 195.
The *Aguilar*, 1 Cr. Rob., 32.
The *Sallie*, 3 Cr. Rob., 148.
The *Europa*, Acton, 320.
3 Phill. Int. Law, 704-709.

h. If a person wishes to procure the restitution of any property captured as prize, it is *necessary* that

he should, after the prize libel is filed, and at or before the return of the monition thereon, or time assigned for the trial (or, perhaps more accurately, within a year and a day after the return of process) enter his *claim* for such property before the proper court.

Pratt's Pr. Pr., 19.

i. The claim is a mere statement that the property belongs to the claimant. Accompanying the claim there must be an affidavit which is called the test affidavit, and which should state that the property, at the time of shipment and also at the time of capture, did belong, and will if restored belong, to the claimant. Any further allegations in a claim will be struck out as impertinent.

Admiralty Rule (Supreme Court), 26.
The *John Gilpin*, Blatch Prize Cases, 291–2.
The *Empress*, Blatch Prize Cases, 147.
The *Cheshire*, Blatch Prize Cases, 152.
The *Delta*, Blatch Prize Cases, 133.
The *Gray Jacket*, 5 Wall, 366.

It is the universal rule of the Prize Court that no one can claim property which is libelled as prize, except the *general owner* of the property.

Judge Story's words, "A claimant in a Prize Court *must* be the general owner of the property" (Art. on Prize, 10 Encyc. Amer., p. 364), have been repeated by almost every writer on prize since his day.

See 1 Wheaton, Appendix by Story, p. 500.
Pratt's Prize Practice, p. 52.
3 Phillimore's Int. Law, p. 705.
Upton on Prize, p. 255.

Of course it is not to be understood by this that no one but the general owner can perform the ma-

nual action of filing a claim in a prize case. That may be done through a proctor as in other causes. It may be done by an agent. Such agent may be a special agent or correspondent.

He may be a consul.

He may be a supercargo of goods.

He may be a master of a ship, claiming for the owner of the ship or for the owner of the cargo.

Pratt's Prize Practice, pp. 6, 7. Upton on Prize, p. 255.

Admiralty Rule, 26.

But in such cases not the agent, consul, supercargo, or master is the claimant, but the absent principal. And *who is* such principal must always appear by the claim and the test affidavit which accompanies it. Such principal is the claimant, and he *must* be the general owner of the property, as shown by the authorities above cited.

Laird, then, was the *claimant* in the case of the *Wren*.

j. The pleading of the claimant in a prize cause where property is libelled as prize is called a claim.

The neutral *owner*, whose property has been libelled, comes to the Prize Court and says: "I am a neutral and I claim this property as mine." His claim is the pleading. He puts in no answer at all.

Pratt's Prize Practice, p. 6, 7, 19, 50, 51. "In cases of heavy suspicion and great importance the Court *may order* what is called Plea and Proof. * * * These solemn proceedings are *seldom* resorted to." Id. p. 10. They were not resorted to in this case of the *Wren*.

In the precedents of pleadings which the Court will find in Pratt's Prize Practice and Pratt on Contraband of War, no form of an answer will be found, but claims.

k. On the libel, claim, ship's papers, and examinations *in preparatorio* the cause is brought to a hearing in the first instance.

k. No claim will be admitted which stands in entire opposition to the ship's papers and the preparatory examinations.

2 Wildman's Int. Law, 368.
The *Diana*, 2 Gall., 96.
The Ship *Francis*, 1 Gall., 445.
The *Ann Green*, 1 Gall., 287–8.

l. On this claim of the claimant the burden of proof is on him to establish the fact which he has alleged.

Pratt's Prize Practice, p. 26.
Id., p. 53.
The *Amiable Isabella*, 6 Wheat., 77.
Hinchcliffe's Rules (Vice Admiralty of Jamaica), p. 19.
The *Bremen Flugge*, 4 Rob., 92.
The *Dash*, Edwards, 273.
The *Charlotte*, 1 Dodson, 213.
The *Sally Magee*, 3 Wall, 458.
The *Rover*, 2 Gall., 241.
The *Sally*, 1 Gall., 401.

"The claimant must establish his title to restitution in the first instance."

The Ionian Ships, 2 Spinks, 214.

"If there be a total defect of evidence to establish the proprietary interest, it is presumed to belong to an enemy."

Pratt's Pr. Pr., p. 55.
The *Magnus*, 1 Rob., 30.

"The libellant and the claimant are both actors. They both demand from the Court the thing in contest."

Marshall, C. J., in Jennings *vs.* Carson, 4 Cranch, 23.

"The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by *proving if he can* the neutrality of the property."

Croudson *vs.* Leonard, 4 Cr., 437.
Approved by Marshall, C. J., in
The *Mary*, 9 Cr., 146.

THIRD POINT.

The proceedings in the case against the *Wren* followed the practice above set forth.

a. The *Wren* was libelled in the proper manner simply as prize.

b. In accordance with the rules above set forth, the master of the *Wren* filed the claim to the vessel, in behalf of his absent principal. He alleged, as he was in duty bound to do, who such absent principal was, viz., John Laird, and that he was the *true* and *bona fide* owner of the vessel.

Here his pleading should have stopped. The denial which he attached to his claim was superfluous. The issue arose on his claim.

c. The evidence furnished to the Court on this issue was, in accordance with the rules of prize proceedings, the evidence of the vessel, her master, her crew, and her papers.

The evidence in a prize cause is not furnished by the *captors* in the first instance, but, as we have seen, comes from the vessel.

"The principle of the Prize Court is that the case is in the first instance to be tried on evidence coming from the *captured*."

The *Ostsee*, 2 Spinks, 185.

"I need hardly repeat what I have availed myself of prior opportunities to say—that the Court can only restore when the affirmative proof is satisfactory; that according to the accustomed doctrine of the Court, founded in justice and equity, as the case must first be heard on the *claimant's own evidence*, namely, the ship's papers and the examinations in *preparatorio*, *the onus probandi must lie upon the claimant, who has to establish the affirmative*."

The *Soglaise*, 2 Spinks, 102.

FOURTH POINT.

The question before the Prize Court was this: "Has the claimant, by the evidence from his vessel, sustained the allegation of his claim that he was the owner of this vessel, the burden of which, by the law, is upon him?"

This question the District Court decided in the negative. The Supreme Court decided it in the affirmative; and unless it can be claimed that some one else beside John Laird, Jr., was the claimant of the property, it must be conceded that the Supreme Court decided that John Laird was the owner of the vessel.

But it was the very decision of the Supreme Court that John Laird was the claimant.

a. The question before the Supreme Court, on the appeal, was only this, "Whether the vessel was owned by said Laird, a British subject, or not?"

This was the point argued by counsel, (see brief of Pierrepont, fols. 126–135, and 197), and was the very point decided by the Court (see 6 Wallace, 586).

The Court say: "The certificate shows that the *claimant* is the builder and *owner*." * * * "The *claimant* not only built the vessel, but put *his* master in command." * * "These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the *claimant*" (fol. 197).

Whom did the Supreme Court mean by the *claimant?* They meant John Laird, Jr. Not Stiles, for he did not build the vessel or put any master in charge of her. Not Prioleau, for he did not appear. The garnishees, who now claim to have represented him, were careful to keep any idea of his interest from the mind of the Supreme Court. They stood by, and their principal stood by in their person, and heard the Supreme Court say: "The title to this vessel is in the claimant." They knew that the Supreme Court meant by the claimant, John Laird, Jr.; and when the mandate of that court directed the vessel to be restored "to the claimant," they knew that that mandate meant to restore it to John Laird, Jr., and to him alone. Thereupon, they procured Laird's power of attorney, authorizing them to act for him. And having presented it to the District Court in Florida, they procured its decree, that the money should be restored to Laird, claimant.

The sole foundation of this decree was, that the Supreme Court had found, as a fact, that when the *Wren* was seized she was the property of John Laird, Jr., and of no one else.

b. The Supreme Court not only actually did decide this question, but were compelled to decide it. The whole object and purpose of the prize suit was to determine the *status* of the vessel. She was libelled as prize. All the world were cited to appear and interpose their claims to her. Laird alone appeared and claimed her as his, and therefore as being neutral property. Every one else, by their silence, gave up to him such claim on her as they had. The law of prize is, that where the question is one of neutral property, the burden of proof is always on the claimant.

Pratt's Prize Practice, 26.
3 Phillimore, Int. Law, 723.
Brown *v.* United States, 8 Cranch, 135.
Supra p.

The District Court condemned her as enemy's property. This decree necessarily negatived Laird's claim of ownership, and from it Laird appealed. The Supreme Court, in order to overcome the legal presumption that the vessel was enemy property, had to determine that she was the property of somebody else than an enemy, and to determine also who that somebody else was, or they could not have told whether she was enemy's property or neutral property.

And if there were any doubts as to the effect of the decree of the Supreme Court, these garnishees have made it certain by the final decree which they procured to be entered, directing the proceeds to be restored to "John Laird, Jr., the claimant." Since "a claimant must be the general owner of the property," this decree has the same force as if it read, "restored to John Laird, Jr., the general owner of the property."

c. If it be denied that Laird was the claimant, it must be on the ground either that Stiles was the claimant, or that some one else represented by Stiles was the claimant, to wit, Prioleau.

1. Stiles was not the claimant.

His claim is the claim of a master of a vessel. He could not make a claim to the property himself, for the claimant in a prize court "*must be the general owner of the property*," as Judge Story says (ante p.16). And furthermore, Stiles did not pretend to claim as owner. He averred that he was only bailee, and that Laird was owner.

Claims by masters of vessels are frequent in prize cases; but when they are so interposed, it is not the agent, but the principal—not the master but the owner, who is the claimant.

The *Crenshaw*, Blatch. Prize Cases.

Claim filed by Irwin & Co., "in their own behalf, and that of Scott & Clarke" (p. 25). * * * "The *claimants*, Clarke & Scott, intentionally violated the blockade" (p. 30).

The *General Green*, Id.

Atwell, the master, interposed a claim alleging that the vessel belonged to Mr. Oppenheim.

"The only question," says the Court, "is whether the vessel, being owned by the *claimant* Oppenheim," etc. (p. 40).

The *Cheshire*, Id.

Craig, the master, filed a claim, averring that Jos. Battersby was the owner of the vessel, and Jos. and Wm. Battersby were owners of the

cargo (p. 152). But the Court speaks of "the present *claimants*, J. and W. Battersby" (p. 153).

The *Sally Magee*, Id.

Here also a claim was interposed by the master (p. 382), but the Court says, "the *claimants* (p. 385) can secure no exemption," etc.

2. Nor can it be argued that Prioleau, although not named, was the claimant.

a. Prioleau was an alien enemy. He was a member of the firm of Frazer, Trenholm & Co. (fol. 192), and Frazer, Trenholm & Co. were a branch of the Charleston House of John Frazer & Co., and were employed as a depositary and agent of the Rebel Government at Richmond.

The *Bermuda*, 3 Wall., 514–544.

Where an enemy claims, he must show a *persona standi in judicio*, the law being that an alien enemy is not entitled in any way to sue in this or any other court."

The *Troija*, 1 Spinks, 343. 3. Phil. Int. Law.

b. Nor could a claim for Prioleau have been allowed, because it was against the papers of the ship.

The *Ann Green*, 1 Gall., 287–8.
The *Diana*, 2 Gall., 97.
Pratt's Prize Pr., 20.
2 Wildman Int. Law, 368.

FIFTH POINT.

The decision of the Supreme Court of the United States, that John Laird was the owner of the *Wren*, and that it be restored to him as such, is conclusive of the fact decided, and cannot be contradicted or questioned.

a. The judgment of a prize court being the judgment of a court of exclusive jurisdiction, proceeding *in rem*, is binding on the whole world, and is conclusive both of the right established and of the fact decided.

In Croudson *vs.* Leonard, 4 Cranch, 437, Mr. Justice Washington says: "It is a well-established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point may be given in evidence as conclusive between the same parties upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the *fact which it directly decides.*

"This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine I am now considering, upon the ground that *all the world are parties* in an admiralty cause. The proceedings are *in rem*, but *any person* having an interest in the property may interpose a claim," etc.

In Penhallow *vs.* Doane, 3 Dallas, 86, Patterson, J., says: "The sentence of a court of admiralty or of appeal, in questions of prize, binds all the world *as to everything contained in it*, because all the world are parties to it. The sentence, as far as it goes, is conclusive to all persons."

And Iredell, J., in the same case, in deciding that the erection of courts of admiralty was a function

delegated to Congress exclusively, says, p. 91: "A prize court is in effect a court of all the nations in the world, because all persons in every part of the world are concluded by its sentences in cases coming clearly within its jurisdiction. Even in the case of citizen and citizen I do not think it a proper subject for mere municipal regulation, *because, as was observed at the bar, a citizen may make a colorable claim which the Court may not be able to detect, and yet a foreigner be fatally injured by it.* In case of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another person, living at a distance, may have a superior claim which he has no opportunity to exhibit."

> Palpably no foreigner could be fatally injured by the presentation of a colorable claim in a case of prize, unless a sentence awarding the *res* to the colorable claimant concluded the real owner.

In Bradstreet *vs.* The Neptune Insurance Co., 3 Sumner, 605, Story, J., says: "That the sentence of a foreign court of admiralty and prize *in rem*, is in general conclusive, not only in respect to the parties in interest, but also for collateral purposes and in collateral suits, not only as to the direct matter of *title* and *property* in judgment, but also as to the *facts* on which the sentence professes to proceed, although formerly subject to much doubt and controversy, is now a point fully established in Courts of England and the courts of the United States."

In *Bolton vs. Gladstone*, 5 East., 155, Lord Ellenborough, C. J., says: "Since the judgment of the House of Lords in Lothian *vs.* Henderson, it may now be assumed as the settled doctrine of English law, that the sentences of foreign courts of compe-

tent jurisdiction to decide all questions of prize, are to be received here as conclusive evidence in actions on policies of assurance upon *every subject immediately and properly within the jurisdiction* of such foreign courts, and upon which they have professed to decide judicially."

Barzillay vs. Lewis, MSS., reported in 1 Marshall on Ins., 2d American Ed., p. 398, was an action against the insurers. The ship, originally a French vessel, was captured and condemned at Liverpool, where the name *Three Graces* was given her. She was then bought by a Liverpool merchant for a house in Amsterdam, her name translated into Dutch, a Dutch pass was sent her from Amsterdam, she was insured warranted Dutch property, sailed for Amsterdam and was captured by the French and condemned as the *Three Graces* of Liverpool. The insurers put the condemnation in evidence as proof of a breach of the warranty, and it was held conclusive. Lord Mansfield said: "The warranty meant that the ship was Dutch, to the purpose of being protected, and the sentence of the Court of Appeal in France is conclusive. The question then is, what the sentence means. The ship is condemned as not being Dutch. The warranty was that she was Dutch, which was false, * * * If the sentence had gone on a ground collateral to the property, the plaintiff would have been permitted to go into evidence to show the truth of the warranty."

In the case at bar the sentence of acquittal went on the ground that the *Wren* was the property of John Laird, Jr., and was therefore *not enemy property*, as which she had been condemned below, and is conclusive on that point. Had the sentence gone on ground collateral to the property, the garnishees might possibly have been admitted to show want of title in the claimant.

In Calvert *v.* Bovill, 7 T.R., 523, where this question was raised, Mr. Justice Lawrence said, "The cases alluded to in the argument seem to have established this, that if it can be collected from the sentence itself, on what ground the foreign court decided, that would be conclusive in any action brought in this country. But if it were ambiguous, or did not show on the face of it on what ground they proceeded, then the court here might receive evidence to show what were the grounds of the decision abroad."

Other authorities are—

Hudson *v.* Guestier, 4 Cranch, 293.
Stoughton *v.* Taylor, 2 Paine C. C. R., 679.
Jennings *v.* Carson, 4 Cranch, 23.
Geyer *v.* Aguilar, 7 Term Reps., 681.
The Segredo, 1 Spinks, 58.

See also Benedict's Admiralty, §§ 364–5—where the rule is stated and the reason for it given.

b. The conclusiveness of the judgment of courts of exclusive jurisdiction proceeding *in rem*, both as to the right declared and the grounds on which the sentence professes to proceed, has been affirmed in many cases other than those of prize.

In *Street v. Augusta Ins. Co.* (12 Rich., 13), which was an action on a policy of insurance to recover for damages suffered by a collision, the defendants pleaded the negligence of the plaintiffs as a defence, and offered the sentence of an admiralty court condemning the plaintiff's vessel in damages by reason of such negligence, on a libel by the owners of the other vessel. Held conclusive.

In *Magoun vs. New Eng. Marine Ins. Co.* (1 Story, 157), which was an action to recover the value of a vessel which rotted pending a litigation

to condemn her for smuggling, resulting in her acquittal, the defendants offered to prove probable cause of seizure, which the decree of acquittal negatived, and also that the master swore falsely, etc.

Story, J., said: "The most that can be said is that the master concealed the facts, etc., and that thereby both courts were misled in their decrees. But concealment of facts would be a new head of the law upon which to avoid a sentence of condemnation or acquittal *in rem*. * * * It appears to me that, independently of fraud (a point which will be presently considered), the sentence is conclusive."

In *The Apollon* (9 Wheat., 362), Story, J., says: "A decree of acquittal on a proceeding *in rem*, without certificate of probable cause of seizure, is conclusive evidence, in every inquiry before every other tribunal, that there was no such cause."

In *Rose vs. Himely* (4 Cranch, 512), Johnson, J., says: "The jurisdiction of the Court of Admiralty is of a peculiar nature, acting wholly *in rem*, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel. Its decrees are laid down to be conclusive against all the world, a doctrine which, *as to the right of property in the subject libelled, is strictly and universally correct*, whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of admiralty jurisdiction, and the court professes to sit and judge according to the law of nations and the style of admiralty." And in the same case, Marshall, C. J., says, p. 276: "If the Court of St. Domingo had jurisdiction of the case, its sentence is conclusive."

Whitney *vs.* Walsh (1 Cushing, 29) was a case where suit was brought to recover back the purchase-money paid for cigars, which, after the sale,

were condemned as smuggled. The defendant objected to the record of condemnation because he was not a party to the proceeding. But the Court held that it was not only admissible but conclusive. Wilde, J., says: "It is a well established principle that the sentence or decree of a Court of Admiralty and Maritime Jurisdiction *in rem* is binding on all the world *as to the points in issue* and judgment thereon."

Gelston vs. Hoyt (3 Wheat., 312) was a case where, after acquittal of property seized for violation of revenue laws, without certificate of probable cause, suit was brought against the Marshal for damages for the seizure, and when he offered evidence of probable cause, the decree was held conclusive against him.

Story, J., said: "The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits so far as their interest extends. The decree of the Court acts upon the thing in controversy and *settles the title to the property itself*, the right of seizure and the question of forfeiture. If its decree were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In cases of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons, *toties quoties*, for the same offence, and the claimant be loaded with ruinous costs and expenses.

c. Such judgments settle the title to the *res*.

Marshall, C. J., in *Williams et al. vs. Armroyd et al.*, 7 Cranch, 423–32, says:

"It appears to be well settled in this country, that the sentence of a competent Court, proceeding *in rem*, is conclusive with respect to the thing itself and operates as an absolute change of property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree."

See also Gelston *v.* Hoyt, *supra*.

1. The truth of this proposition in cases of sentences of forfeiture or condemnation need be sustained by no quotation of authority.

2. That it is equally true in cases of acquittal, is manifest, since in such cases, *ex necessitate rei*, the Court must decide to whom the property belongs in order to determine to whom it shall be delivered.

"In cases of this sort (that is in *rem*) it is wholly immaterial whether the judgment be of acquittal or condemnation. In both cases it is equally conclusive." Story's Conflict of Laws, § 592.

In the case of The *Panama*, Olc., 353, the Court say: "The Court being rightfully in possession of the funds representing the ship arrested, must necessarily, as incident to that possession, have power to decide who is entitled to withdraw them from the registry."

In The *Mary Anne* (Ware, p. 100), the Court says:

"The process acts on the thing itself, and places it in the custody of the Court. When thus in its possession, the Court is bound to preserve it for all who have an interest in it, and not to deliver it but to those *who prove a title*."

To the same effect are *La Jeune Eugenie*, 2 Mason, 409, and *Andrews v. Wall*, 3 How., 568–573.

3. In close analogy to this case is that of the grant of probate or administration.

Ennis vs. Smith (14 How., 400). This was an action to recover for the descendants of the sisters of Kosciusko, as his next of kin, funds in the United States, belonging to him, and as to which he died intestate. The Court below dismissed the bill on the ground (among others) that the plaintiffs had not proved themselves the next of kin of the deceased. The only proofs offered in that behalf were decrees of the Government of Nobility, at Grodno, and of the Court of Kobryn, in Lithuania. The competency of the jurisdiction of these tribunals in matters decided upon by these decrees was proven. The Supreme Court reversed the judgment of the Court below, and in their opinion, referring to this decree, say, "it is not a judgment *inter partes* but a foreign judgment *in rem*, and is evidence of the facts adjudicated against all the world."

In *Noel vs. Wells* (1 Lev., 235–6), it was held that "a grant of probate or administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares belongs to him. Accordingly such grant of probate or administration is conclusive against all the world." It may, indeed, be shown that the grant was revoked, for that is the further act of the same Court; or that it was forged, for that shows it not to be the act of the Court at all; or that it was granted by a Court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that the will was forged, for those facts might have been alleged in the Ecclesiastical Court in opposition to the grant of probate.

So in this case the garnishees might have shown that the decree of the Florida Court had been reversed, or that the record of that decree was forged, or that that Court had no jurisdiction. But they could not show that Laird was not the owner of the *Wren*, for that fact might, and if true, should have been alleged in the Prize Court in opposition to the final decree.

SIXTH POINT.

The decree of the Prize Court is, of course, effective to pass the title to a vessel which is sold under it. But its effect is by no means limited to that case. Where the question of prize or no prize depends upon *the question of enemy's property*, the decree of the Prize Court determines the question of *the title to the vessel at the time of the seizure.* That is a fact on which the "direct matter of title and property in judgment," as Judge Story says, is based.

(*a.*) A little consideration will show good reason for this rule. Why does a prize court examine the papers of a vessel to determine the question of prize or no prize?

And what is the reason of the rule that the claimant of a vessel is the actor and must prove that he is the owner of the property and entitled to its restitution?

The reason is found in the just requirement of the prize law, that every vessel when brought before a prize court shall tell the absolute truth about herself and her cargo.

Nor is it sufficient if a legal title appears. The equitable title must be shown. The *actual facts* must be presented to the prize court.

"The law of nations requires good faith, there-

fore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction."

Letter of Sir Wm. Scott and Sir John Nichol to Mr. Jay, in Upton on Prize, p. 288.
2 Wildman Int. Law, 353.

And furthermore the prize law requires that the true, the real owner of the property must claim, by whatever agent the claim is presented.
Ubi supra.

(*b.*) The reports of prize cases are full to show that falsehood, either in papers or testimony, is fatal.

We submit the following citations:

"The Court of Prize never goes on a mere formal instrument. Over and over again Lord Stowell has said: It is not the documents themselves which the court goes upon. *They must be true. They must be bona fide.* Lushington J., in the *Ocean Bride*, 2 Spinks, 20.

If a mere legal title would justify the court in restoring property the consequences would be most alarming, for nothing would be easier than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shown this court is bound to restore, for I hold that an equitable title is also necessary to support a claim in this court."

The *Ida*, 1 Spinks, 339.

"There is not only the bill of sale, but also other papers which have a regular appearance, so that if the court pronounces against the

claim, it must pronounce that these papers, several in number, are mere fabrications, utterly void of truth. The first observation made on the part of the captors is that, upon any supposition, the papers should be regular, and it is true; for the very intention of fraud is, if it be a fraud, to deceive by the regularity of the papers. It is the necessary apparatus and machinery of such a case. And, therefore, it is by no means enough to say, "Our papers are all in order." "What!" it is asked, "Do you hold papers for nothing? Are we to have a new law of nations in which it is to be held that regular documents are of no avail?" Certainly not. Such papers duly verified and supported are strong *prima facie* evidence in all cases, and if unopposed are conclusive evidence, but if there are circumstances and facts appearing in the case, leading justly to the conclusion that those papers, though formal in themselves and though formally supported by oath, are nevertheless false. it would be ridiculous to say that the court is bound by them. It is a wild conceit that any court of justice is bound by mere swearing; it is the *swearing credibly* that is to conclude its judgment."

The *Odin*, 1 Ch. Rob., 248–252.

"Where there has been a suppression of an enemy's interest with a fraudulent view, the party engaged in that fraud shall not be permitted to supply the defects of proof of his own property mixed up with it."

The *Graaf Bernstoff*, 3 Ch. Rob., 99.

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The *Graaf Bernstoff*, 3 Ch. Rob., 99.

"Where a party has been convicted of an attempt to impose on the court in the same

transaction, the privilege of further proof shall be denied him, as a privilege which is justly forfeited by deception and fraud."

The *Endrom*, 2 Ch. Rob., 13.

"If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it as a neutral vessel, it would be impossible for the court to protect itself against frauds." Further proof rejected.

The *Jemmy*, 4 Ch. Rob., 27.

"In my judgment the great principles of national law require that no secret liens, no future elections, no private contracts looking to future events, should cloak with the garb of neutrality the property of an enemy while sailing on the ocean."

The Ship *Francis* and Cargo, 1 Gall., 445.

Story, J. "Now I take the general rule to be that no claim shall be admitted in opposition to the depositions and the ship's papers. It is not an inflexible rule, for it admits of exceptions, but on examination it will be found that those exceptions stand upon very particular grounds, in cases occurring in time of peace, or at the very commencement of war, and granted as a special indulgence. But in times of known war, to admit claims in opposition to all the preparatory evidence and papers, to enable parties to assume the enemy's garb for one purpose and throw it off for another, would be holding out an invitation to frauds, and subject the court to endless impositions."

The *Diana* and Cargo, 2 Gall., 96.

See also

The *Sally*, 1 Gall., 401.
The *Ann Green*, 1 Gall., 282.
The *Liverpool Packet*, 1 Gall., 527.
The *Betsey*, 2 Gall., 377.

"The title deed to the ship should be on board the ship."

The *Christine*, 2 Spinks, 26.

"Mr. Boland must have known that it would be prudent to have a cargo of this nature, being a cargo sent from a belligerent country to another European port, fully documented, and by *fully documented* I mean that there should be the regular papers, supported by the knowledge and testimony of the master."

The *Adriana*, 1 C. Rob., 317.

(*c*.) Acting upon these principles the Prize Court looks to the papers of the vessel and the evidence of those on board of her, and from them it determines the fact, on which the "matter of title and property" depends.

And it must be borne in mind, also, that all the world are parties to a prize proceeding, and for this reason any one may intervene who is the real owner of any part of the vessel, and may defend his interest as suits him best.

In the case of The *Mary* (9 Cranch, 144), Marshall, C. J., said, "The whole world, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason on which this dictum stands will determine its extent. Every person may make himself a party and appeal from the sentence; but notice of the

controversy is necessary in order to become a party, and it is a principle of natural justice of universal obligation, that before the rights of an individual be bound by a judicial sentence he shall have notice, either actual or implied, of the proceedings against him. When these proceedings are against the person, notice is served personally or by publication; when they are *in rem* notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and it is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person therefore who could assert any title to the *Mary* has constructive notice of her seizure, and may fairly be considered as a party to the libel."

The Prize Court, therefore, virtually says to all the world, in all cases where the question of enemy property is concerned: "We propose to try the question of the title to this vessel, and to try it on these papers on board of her, which are required to tell the truth. If you have anything to say why we should not so determine it, come forward and say it, otherwise hold your peace hereafter."

Thus saying its determination is conclusive, on the facts involved, against all the world—and so it ought to be. For any one who would afterwards maintain that the facts were not in accordance with the decision, must maintain that the papers of the vessel and the evidence of the master, on which the decree of the Court was founded, did not conform to the truth.

And this no one, who was in any way interested in the matter, will be allowed to maintain.

(*d.*) Look for a moment at the circumstances of the case of The *Wren*. In view of the remarks then

made by this Court about the "matters for well-grounded suspicion" in the "facts and circumstances surrounding the history of the vessel," can any reasonable man doubt that if this fact, by which it is now sought to overthrow that decision of the Supreme Court, had been then made to appear, it would have turned the scales of justice, which obviously hung in doubtful balance?

If the fact of this bill of sale, from Laird to Prioleau, five months before the capture, had appeared either on the register or in the evidence of the master, is there any doubt as to its effect upon these "well-grounded suspicions?" The status of Mr. Prioleau, as was argued before the Court, "was established by the judicial records of Great Britain and the diplomatic history of the late contest." Counsel might have added, "and by the judicial records of our own Courts." If they had proceeded to refer to the opinion of this Court, in the case of the *Bermuda*, 3d Wallace, 544, the Chief Justice would probably have said to counsel, as Lord Stowell did say on a similar occasion, "I do not forget the information which I have received from other cases" (2 Spinks, p. 10, n.)

It is the custom of the Court, where information has been acquired in one case, to use it in another.

> The *Ocean Bride*, 2 Spinks, p. 20.
> The *Magnus*, 1 Ch. Rob., 31.
> The *Alexandra*, 1 Gall., 536.
> The *Romeo*, 6 Rob., 357.

Can there be a moment's doubt that this fact was studiously concealed from the knowledge of the Court?

> "There is another point of law to which I must now refer. It is not possible to doubt for a single moment that there was an intention in this case by means of colorable bills of

lading and of this non-apparent charter party to deceive and defraud this country of its belligerent rights. Human ingenuity can discover no other reason for such a proceeding than to cover enemy's property as neutral. But it is said that Behrens & Company cannot be affected by this because it was not done under their authority. It appears, however, to have been the act of the master, who must be responsible, and the act of their own agents, Messrs. Heyman."

The *Ida*, 1 Spinks, 339.

And can this Court now hold that a party who, by concealing a fact from the knowledge of the Court, has procured the decree as to the title of the vessel which he then desired, will now be permitted to set up that fact against the decree? If Mr. Prioleau was before the Court, would the Court hear him saying: "The papers of my vessel did not tell the truth. The master of my vessel either falsified or else did not know the truth of the transaction. I pray you now to allow me to prove that falsity." That would be to overthrow the settled policy and principles of prize law. It would be to offer a premium for concealment and falsification.

If it be urged that Prioleau knew nothing of the case until after claim filed and condemnation decreed, and therefore had no opportunity to tell the truth, we answer that it was his right and duty, having taken the appeal, to file his claim and disclose the truth or to abide the consequences.

"A person not being a party in the first instance *may* appeal but *must* claim."

Horne's Comp. of Prize Law, p. 47.
The *Mary*, 8 Cr., 388.
The *Harrison*, 1 Wheat., 298.
Burton *v.* Franklyn, Carthew, 474.

SEVENTH POINT.

These garnishees, as attorneys of Prioleau, procured a decree from the Prize Court that the proceeds of the *Wren* should be paid to John Laird, claimant, that is to John Laird by virtue of his claim in the Prize Court, which was a claim to the vessel as her "*true and bona fide owner.*" Having procured such a decree from that Court this Court will not hear Prioleau, nor them as his representatives, to say that he and not Laird was the owner.

If Prioleau and Laird were the parties before this Court on the above facts, the decree of this Court would be for Laird.

De Mettou *vs.* De Mello, 12 East. 234.

This case and the case at bar are singularly alike. This was an action for money had and received, to recover the proceeds of a cargo shipped by the plaintiffs at Lisbon for Nantes, captured, libelled as prize, claimed by the defendant and restored to him. It appeared that the defendant was a clerk for the plaintiffs, and lent his name to neutralize the property.

Ellenborough, C. J., at the Circuit, nonsuited the plaintiffs on the ground *that it did not lie in their mouths to gainsay that the property of the cargo was in the defendant*, after he had, with their privity and consent, put in a claim as owner before the Court of Admiralty, which had been induced, on that statement of facts, to award restitution of the cargo to the defendant as neutral property belonging to himself.

A rule *nisi* for a new trial was refused by the King's Bench, with the following opinion:

"ELLENBOROUGH, C. J.: I think that the plaintiffs are estopped by their own act, in setting up and establishing in the Court of Admiralty the claim of

De Mello to this property, from now turning around and insisting upon it as their own. If they could have shown that De Mello had acted tortiously as against them in setting up a false defence and claim to the cargo as his property in that Court, that might have served them; but, on the contrary, it appeared that he had acted all through with their privity and consent. De Mello may have behaved like a rogue to the plaintiffs, but both plaintiffs and defendant have behaved wrongfully as against this country in colluding to make French property appear to be Portuguese, in the Court of Admiralty, upon the question of prize as against the captors.

"The plaintiffs should go back to the Admiralty and have the matter set right there, that the opinion of the Court may be taken upon a true statement of facts."

On the authority of this case, therefore, Prioleau could never be heard to say that this vessel was not Laird's property. No case has been suggested by the counsel for the garnishees which points to any different rule.

In addition to the case of De Mettou and De Mello the same principle has been repeatedly held by the prize courts.

> "A party who takes the benefit of a flag and pass is himself bound by them. He is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the char, acter which he has worn for his own benefit and upon the credit of his own oaths or solemn declarations."
>
> The *Fortuna*, 1 Dodson, 87.

> "I distinctly say if a man chooses to clothe himself fictitiously with a Danish character, and the Court, from all the evidence,

detects the falsehood of the character which he pretends to assume, I think it is not very consistent with law and justice that he should be entitled to say, 'I played the rogue, I tried to persuade you that I was a Dane, but I am in reality a Russian. Give me the benefit of that Order in Council which I should have been entitled to if I had acted as an honest man.'"

The *Soglasie*, 2 Spinks, 107.
See also The *Atlantic*, Id., p. 93.

"A neutral having agreed to cover with his name property of enemies, and to claim personally the property so covered, was condemned in costs of appeal." The *Falcon*, Acton, 331.

See also

The *Success*, 1 Dodson, 132.
The *Vrow Elizabeth*, 5 Ch. Rob., 2 and note.
The *Goede Hoop*, 2 Acton, 32.
Maclachlan on Ship, 525-6.

We add the following authorities in support of this principle from other than prize cases:

One making an assertion in acts of court is estopped thereafter to deny it.

The *Mary*, 1 Mason, 367.

When a man alleges a fact in a court of justice for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice.

Wills *v.* Kane, 2 Grant's Cases, 63.

One who has intervened in a suit on a bottomry bond, as mortgagee, is estopped from claiming the surplus as owner.

The *Panama*, Olcott, 343.

"Ships are presumed to belong to the country under whose flag and pass they navigate. * * This circumstance is held conclusive upon their character against the claimant, he being not at liberty to deny the character which he has worn for his own benefit and upon the credit of his own oath or solemn declaration."

3 Greenleaf on Evidence, p. 400, § 459.
See also Mace *v.* Cadell, Cowper, 232.

If it be suggested that Prioleau was not a party to the prize proceedings, we say:

1. The sole foundation of the defence of the garnishees is that Prioleau was the owner of the Wren from the 3d of January, 1865.

2. The oath of Stiles, taken June 26, 1865, was, if that be so, the oath of *his* agent, and therefore his oath.

3. The proceedings in this Court were confessedly his proceedings. It was he, through his agents, his attorneys, these garnishees, who procured the decree of this Court and the decree of the Florida Court on the mandate decreeing the payment of the money to John Laird, claimant.

4. Prioleau therefore was no stranger to those proceedings, and is bound by them.

Lord Mansfield: A captor may and must force every person interested to defend, and every person interested may force him to proceed to condemn without delay.

Lindo *v.* Rodney, 2 Douglass, 613.

"It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; but the converse of the rule is equally true, that by proceedings to which he was not a stranger he may well be bound. Under the term parties in this connection the law includes all who are directly interested in the subject matter, and had a right to make defence or control the proceedings and to appeal from the judgment."

Lovejoy *v.* Murray, 3 Wall., 18.

EIGHTH POINT.

It cannot be claimed here that these garnishees received this fund as the agents of Priqleau, for the Circuit Court found that they received it as agents of Laird, and the garnishees have not appealed.

NINTH POINT.

The above propositions being true, it follows that the evidence offered by the garnishees should have been excluded. No evidence can be received against the decree of the Prize Court unless it be evidence of a title acquired subsequent to the seizure.

(*a.*) But there is no evidence of any such subsequently acquired title. The only evidence offered to prove title in Prioleau is the bill of sale of January 3d, 1865, executed five months before the seizure.

(*b.*) As to this paper there is no evidence of its *bona fides*, or that it had any actual consideration. Suspicion is cast on it from the fact that it was not recorded at the Custom-House at the port of registry until May 1, 1865, four months after its pretended execution, and that it was never made to appear in the prize proceedings.

(*c.*) There was no evidence of actual ownership by Prioleau, except the delivery of the bill of sale, nor was such actual ownership found as a fact by the Circuit Court.

There was no evidence, nor is there any finding of the actual payment of any consideration by Prioleau.

(*d.*) The execution of the power of attorney by Laird is entirely inconsistent with the validity of the bill of sale.

(*e.*) That power of attorney and the acts of the parties are consistent with one of three theories, namely :

(1.) That the bill of sale was never a reality.

(2.) A re-transfer of the vessel to Laird ; or

(3.) On the present theory of the garnishees, an attempted fraud on the Prize Court.

On neither theory can it be regarded by this Court.

(*f.*) There is, therefore, no fact to sustain the first conclusion of law of the Circuit Court. The fact that Prioleau was the owner of the *Wren* at the time of her capture is not found; while acts of the parties inconsistent with such fact are found. It follows that the conclusion of law has no fact to support it.

TENTH POINT.

(*a.*) The second conclusion of law is manifestly erroneous.

The sentence of aquittal, procured by Prioleau on the ground that the property was Laird's, certainly did not leave Prioleau free to assert any right against that decree, as we have shown in Point Six. But unless it did it has no materiality to this case.

If the sentence of aquittal went to that extent it would amount to this, that the Confederate Government might have employed these garnishees as its attorneys to procure this decree of aquittal on the ground that the vessel was Laird's property, and the vessel having been restored to Laird under the decree, might file a libel of possession in an Admiralty Court and recover her from him.

A similar proposition was urged by the counsel for the plaintiff in De Metton and De Mello, but with small success.

If such a doctrine could be maintained there would be little use in Prize Courts.

(*b.*) The third conclusion of law is also an error. The decree of the Prize Court did adjudge the fund to Laird, claimant, in *haec verba*.

If a claimant of a vessel, seized as enemy property, *must* be the owner; if the claimant is an actor in the litigation; if the burden of proof is upon him of establishing the truth of his claim; if a Court of Admiralty must deliver funds in its possession only to him who "proves a title," how is the conclusion to be escaped that the Supreme Court, in reversing the decree of the District Court and directing the restoration and payment to Laird, decided that the title to the fund was in him?

If the decree of a Prize Court *in rem* is conclusive against all the world of *the fact decided*, then is the decree in the case of the *Wren*, that the title to her was in Laird, conclusive in this case.

(*c.*) The fifth conclusion of law is erroneous. The conclusive answer to it is

De Mettou *vs.* De Mello (*supra*).

(*d.*) The sixth and seventh conclusions of law, if the preceding conclusions are erroneous, must fall with them.

ELEVENTH POINT.

We make the following suggestions as to the opinion of the Court below:

1. The Circuit Judge seems to have been of the opinion that the claim which was put in in the case of the *Wren*, was a superfluity; that the attorneys of Prioleau might have contested the case just as they did, and procured the same decree of restoration without a claim.

But this is an error as to the practice in prize cases.

If no claim is interposed the property is condemned. The only difference is, that it is not condemned till after the expiration of a year and a day.

"It has not been customary by the modern practice to condemn merchandise in default of claim till a year and a day have elapsed after the service of the process, except where the presumption is strong of enemy's property.—Upton on Prize, 255.

"After a year and a day have elapsed, condemnation goes, of course, if there be no claim interposed." Pratt's Prize Pr., p. 21.

"And if no claim be interposed within that period, the property is condemned, of course, and the question of former ownership is precluded forever." Pratt's Prize Pr., p. 51.

See also the cases cited in our brief (Ante, p. 15), and the following additional authorities to the same point:

The *Zavala*, Blatch. Prize Cases, p. 173.
The *Albion*, Id., p. 95.
The *Lucy C. Holmes*, Id., p. 196.
The *San Jose Indiano*, 2 Gall., 257.
The *Rover*, 2 Gall., 241.

If it be true as stated in the quotation from Bett's Practice in the opinion of the Circuit Judge, as to which this is the sole authority, supported by no adjudicated case, that a claimant may be heard "without putting in a claim in form," still he could only be heard to say that the case was not clear enough to warrant an immediate condemnation. If, after the expiration of the year and day, no claimant appeared, the decree of condemnation would be made.

If any one, after arguing that the proofs were not sufficient to warrant condemnation, asked for a restoration of the property, he *must* claim. As the

same author says just after the quotation given, "If the property is acquitted, a proper party to receive it may then be presented to the court." How presented? Manifestly by claim. And manifestly the court must be satisfied that he is a *proper* party to receive it, to wit, the real owner.

It follows, therefore, that in order to a decree of restoration in a prize cause, there must be a claim by the real owner, and the question of title must be passed on by the prize court. It must determine the title to the property, for it must not deliver it, but to those who prove a title.

The *Mary Ann*, 1 Ware, 100.
La Jeune Eugenie, 2 Mason, 409.

But to what purpose is it to speculate as to what might have been done, if there had been no claim. Here there was a claim—a claim by Prioleau's agent—a claim under oath that Laird was the owner—a claim, in reliance on which this court awarded this property to Laird. How can Prioleau be heard by this Court to aver that that claim was not true?

2. It is confidently asserted that in no reported prize cause can an expression be found to the effect that a prize proceeding "is a suit by the captors to condemn, in which they are required in the first instance to make out their case by proof," as the learned Chief Justice expounds the law (opinion, p. 208), or "that there must be an acquittal because the captors have failed to make out their case," while the expression is frequent "that there must be sentence of condemnation because the claiman thas failed to substantiate his claim."

The error of the learned Chief Justice in this behalf is grounded upon the mistaken idea that there can be no condemnation as prize for default of

claim. This Court has established the error of the premise in the case of The *Mary*, 9 Cranch., 126, where, although they were unanimously of opinion (p. 150) that the *Mary* was protected from capture, nevertheless, while restoring the *cargo* which had been *claimed*, they allowed the condemnation of the *vessel* to stand because there had been a default in claiming:

> Marshall, C. J., stating the reason thus: "By the rules of the Court the condemnation of the vessel was inevitable; not because in fact she was British property, but because the fact was charged *and was not repelled by the owner*, he having failed to appear and to put in his claim."

The further reasoning of this case shows the fallacy of the position of the Court below, that without filing a claim *any one* can, if he choose, contest the condemnation.

The captors in that case urged that because of the condemnation of the vessel the cargo should also be condemned as captured in an enemy ship.

This Court, by Marshall, C. J., held that while it was true that the sentence of condemnation of the ship as enemy property, concluded all who by reason of interest in the vessel had a right, and were bound, to become parties to the suit, nevertheless the owners of the cargo *could neither claim the vessel and contest her condemnation*, nor compel her owners to do so, and, therefore, were not concluded.

3. The opinion states that what is meant by "the burden of the proof being on the claimant" is that the claimant has "the burden of overcoming the effect of the proof which is thus produced in the first instance."

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We submit that this is an error. The burden of proof is on the claimant to *make out his case* on the proof which is produced in the first instance.

The proofs produced in the first instance are the proofs of the claimant. It would be an odd rule, as to the burden of proof, that a party should be held to have the burden of "overcoming the effect" of *his own proofs*. "No evidence shall be admitted against the claimant except such as proceeds from himself from his own documents and from his own witnesses; the captors not being permitted, except in cases marked by peculiar circumstances, to furnish any evidence whatever."

2 Phill. Int. Law, p. 711

4. The opinion says (p. 209): If on an examination of the captors' preliminary proof it appears that there should be an acquittal, and no claimant has filed a claim, the Court will in some appropriate manner ascertain and determine to whom a delivery of the property shall be made."

We do not quite so understand the practice. As we understand it, the Court will in that case postpone a final decision for a year and a day. If in that time no one claims, the Court will condemn. If in that time any one comes forward and files a claim, and the Court is satisfied, on the same proofs as before, that the claimant is the true owner, the Court will restore the property to him. In that case the proofs from the papers on board and the depositions *in preparatorio* become his proofs. If they prove his claim to be true the property is restored. If they are not clear to prove the truth of his claim, the Court may allow him to give further proof—not proof to *overcome* the preliminary proofs, but to supply their defects. Hence they are called "further proofs."

5. The opinion says that "it was nowhere *positively asserted* that Laird was the real owner" (p. 209).

It seems to us that it is treating the claim with great charity to consider that it does not contain a positive assertion of this kind. But if it does not, and if such a positive assertion would have been a material fact in the case (and if it would not, why should the absence of such an assertion be referred to?) why was the finding, which was requested by the libellants, of such an assertion refused by the Circuit Judge as "immaterial?"

(Record, p. 217).

6. The opinion says: "*Prudence* undoubtedly requires that when a master claims for the owner, he should state his belief as to who the owner was" (p. 209).

It is not a question of *prudence*, but of positive rule and practice. The averment is not one which a master may make or omit, according to what he thinks is *prudence*. Without such an averment the claim would not be received at all.

7. The opinion says: "It would be dangerous to hold in this class of cases that a decree of acquittal after such a statement based upon the ship's papers, would cut off a title lawfully acquired after the vessel had left her port of registry and while she was absent on a voyage (p. 209).

Whatever danger there might be in holding such a doctrine as against a party who was ignorant and innocent, there can be no such danger in this case. For if a title is cut off in this case, it is that of Prioleau, who was neither innocent nor ignorant. It is cut off by the act of Prioleau himself. There is no *danger* in holding a party bound by a decree which he has himself procured to be entered.

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But are there no dangers on the other side? If a party who acquires such a title can refrain for five months from putting his title deed on board of his ship, but can run her under the old title, and then when she is captured, can, by his agent, set up the old title to save his property, and can, after he has succeeded in so doing, be held not to be bound by the decree which he has procured, what protection is there against fraud?

What becomes of the fundamental rule of prize courts, that the vessel must tell the truth about herself?

What becomes of the principle that a party who assumes a character or a flag for one purpose, will not be heard to deny it for another?

What is to prevent an enemy from covering the seas with his vessels, purchased from neutrals and sailing in entire safety under the old neutral papers?

This danger is one which the court below seems to have overlooked, but which presented itself with great force to those experienced prize judges, Lord Stowell, Dr. Lushington, and Judge Story.

> "If the enemy could be permitted to make a transfer of the ship and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."—Lord Stowell.
>
> "If a mere legal title would justify the court in restoring property, the consequences would be most alarming, for nothing would be easier than to cover enemies' property from one end of the kingdom to the other."—Dr. Lushington.
>
> "If the principal might withdraw himself from the view of the court and shelter his pretensions behind the affidavit of an innocent or

ignorant agent, there would be no end to the impositions practiced on the court."—Judge Story.

"To enable parties to assume the enemy's garb for one purpose and throw it off for another would be holding out an invitation to fraud, and subject the Court to endless impositions."—Judge Story.

8. The opinion says that property is restored to a claimant "not because he has been adjudged to be the owner, but because on the proofs submited he *appears to* be such" (p. 210); and again, on p. 212, Lairdis spoken of as being the "apparent owner."

This proposition overlooks the prime requirement in a claimant's case, viz., that it shall be *true*. He, or his agent, alleges his ownership and swears to it. The proofs conform to his allegation. Will the Court admit that it is sufficient if such proofs present an *appearnce* only? Will the Court allow him to say that the appearance was false?

9. The opinion says: "If, because of his apparent ownership, he gets possession of that which actually belongs to another, he does so as the representative of the true owner and must account accordingly" (p. 210). But Lord Ellenborough did not think so. He held that De Mello, who because of his apparent ownership, had got possession of what actually belonged to De Mettou, could not be called on to pay it to De Mettou, because De Mello had acted with his privity and consent.

But the present is not the case of Laird's acting with Prioleau's privity and consent to procure the decree. It is the case of Prioleau's own action and of his procuring the decree himself.

10. The opinion says: "So, as all the world has only been called on to appear, if they will, and con-

test the sentence of condemnation, the sentence of acquittal leaves all free, etc." (p. 210).

But how are all the world to contest the condemnation? Clearly only by each one coming in to claim and setting up his own title. Saying nothing about any one else, does the sentence of acquittal leave the one, who sets up a title, free afterwards to deny the title which he has set up, and on the ground of which he has procured the acquittal? If not, the remark has no pertinency to this case.

11. The opinion says (p. 210) that "if there had been no claim in this case, and after a sentence of acquittal the court had ordered the vessel delivered to Laird as the registered owner, such an order would not have transferred the title back from Prioleau to Laird." And again at foot of p. 211,

"Prioleau stands just where he would if *without a claim* the District Court upon the proof had acquitted the vessel and delivered her to Laird."

But under the law the District Court could by no possibility have done anything of the kind.

If there had been no claim, the Court would never have ordered the vessel delivered to Laird, but would have condemned it.

But why argue from the effect of an impossible order to the effect of the actual order?

Wherever Prioleau would stand if an order had been made, which could not have been made without violating every principle and practice of prize courts, the question in this case is "Where does Prioleau stand in this case according to the principles of prize law?"

It is easy enough to argue that if Prioleau were not a party to the decree, had not by his master put in the claim, and had not by his agents, these garnishees, procured this decree, he would not be bound by it. But it hardly follows that,

having done so, he "stands just where he would" if he had not done so.

A reasoning based upon premises, which are both impossible and contradictory of the facts of the case, can hardly be sound reasoning.

12. Again, the opinion says (p. 260): "As the claim in this case was in effect nothing more than for Laird, as registered owner, it is difficult to see how it adds anything to the strength of his position as against the true owner"—meaning, we suppose, Prioleau.

But it would seem, if there is anything in either principle or authority, that the situation of actual owner and nominal owner can not be the same before a court, after an averment in that court by the real owner that the nominal is the real owner.

If "one who makes an assertion in acts of court is estopped thereafter to deny it" (The *Mary*, 1 Mason, 367); if "when a man alleges a fact in a court of justice for his advantage he shall not be allowed to contradict it afterwards" (Wills vs. Kane, 2 Grant cases, 63), how can it be that the position of Prioleau was the same before the court, after his agent had averred that Laird was "the *true and bona fide* owner of the *Wren*," as it was before?

13. The opinion says (211): "The master of a vessel is not presumed to have accurate information on such subject, (viz., liens, etc.), and it is not usual for him to keep on board the evidence required in the trial of such cases.

But why discuss the extent of the master's information as to liens? This is a question of title not of lien, and as to title, "the master should be privy to the truth of the transaction."

And he is bound to have on board the evidence to show in whom the title is.

> "The title deed to the ship should be on board the ship." The *Christine*, 2 Spinks, 24.

14. The opinion seems to concede that "an enemy who has put forward a neutral to claim his captured property as owner, cannot be heard to say that the neutral was not the owner in fact," but it says also that "Prioleau cannot be said to have put forward Laird as owner," and therefore that rule does not apply (p. 212).

The reasons given for this saying that Prioleau cannot be said to have put forward Laid as owner' are that "she went to sea with a certificate of Laird's registry on board," and that Prioleau had obtained a new registry in his own name more than six weeks before her capture.

But how do these facts, if they are facts, show that Prioleau did not put Laird forward *before the Court* as owner? The question whether he put Laird forward as owner is to be determined by what was done *before the Court*, not elsewhere.

If Prioleau is to be held chargeable with the claim which was interposed in this case by the master, who was his agent, how can it be said that he did not put forward Laird as owner? And if he, by his agents, these garnishees, took advantage of that claim to appear before this Court and argue and procure a decision that that claim was true, can he now be heard to say that the claim was not his claim and that he is not bound by the decree?

15. Again the opinion says:

> "If Prioleau were now asking to have the delivery made to him instead of Laird, the Court might, with propriety, refuse to interfere, and leave him to such remedies as he was

> entitled to after the money reached Laird's hands, on the ground that, having waited until a decision had been reached at his instigation, it did not lie in his mouth to object to such a decree as the record required" (p. 213.)

We say amen. And we say further that, if this is so the decree below is error. In the District Court in Florida, for all purposes, Laird was the owner. That Court would have turned a deaf ear to Prioleau's claim. This fund was there attached as Laird's property. The Court has found as a fact that, under the agreement between Foster & Thomson and Ward, all that was done in Florida was with a view merely of transferring the litigation to New York for mutual convenience. (28th Finding.) The Court in New York, therefore, by its attachment took the fund, as the Court in Florida had it. The litigation was to be *removed* only, its character was not to be changed. This was the substantial representation to Mr. Ward in the letter of February 24, 1869. (1st Finding.) To this must all parties be held. If the Florida Court would not have heard Prioleau saying, "This money is mine not Laird's," as against Laird—it would not have heard him as against these libellants. If this was justice in Florida it is justice in New York, and the District Court was right in so holding.

16. Again the opinion says:

> "The captors had no claim upon him (Prioleau) for discovery, and he might keep silence if he chose" (p. 214).

In the face of the repeated declarations of the prize courts and judges—that every vessel *shall* tell the *truth* about herself, that her papers *shall* be

true, and that her master *shall* be informed of the true character of the transaction—that "it is not the *documents* themselves which the Court goes upon—*they must be true; they must be bona fide*—this doctrine is a little remarkable; but when it is considered that it was Prioleau's own evidence that was being considered, evidence which he himself and no one else had furnished the court, the idea that there was no obligation on Prioleau to make discovery, and tell the truth, is consistent with no theory except that theft is no crime, but that discovery only constitutes the guilt—a theory which we do not believe the learned Chief Justice entertains, or this court will encourage.

Prioleau kept silence when he should have spoken; he cannot now be heard.

> "Let the parties learn," said Judge Story (The Alexandra, 1 Gall., 532), "that truth has but one face, and that at their peril they must declare it in its full extent in the first instance, and that if they conceal they must take the consequences of their own misconduct."

17. The opinion attempts to draw a distinction (p. 213) between this case and the case of De Mettou *vs.* De Mello, the binding force of which case seems to be conceded.

It is stated that in that case "a neutral lent his name to neutralize property, and the enemy put the neutral forward as claimant to prevent condemnation," while in this case "there was no fraudulent combination, no putting forward for the purpose of deception." (p. 213).

The distinction between the two cases at the farthest is only this, that De Mello lent his name (how, does not appear) to neutralize property, whereas it may be claimed that Laird did nothing

with reference to the neutralization of the *Wren*, because, she being neutral, he simply conveyed her, and Prioleau was to do anything that was to be done about the title thereafter.

But the making of this distinction between the two cases shows that the ground of the decision in that case has not been properly considered.

That case was decided not on the ground of what De Mello, the detendant, had done or allowed to be done, but on the ground of what De Mettou, the plaintiff, had done, as a glance at the opinion will show.

The ground of that decision was that De Mettou, the plaintiff, had "set up and established in the Court of Admiralty the claim of De Mello to the property." Hence the plaintiff was held estopped from claiming it as his own.

But Prioleau has certainly "set up and established in the Court of Admiralty the claim" of Laird to this property. Why shall not he also be estopped from claiming it as his own?

It surely cannot make any difference whether an enemy, who comes before a prize court under the garb of a neutral, has *put* his property under that garb, or has *left* it under that garb? It is the falsity of the garb which the court condemns, and that falsity is the same in both instances.

In the report of De Mettou *vs.* De Mello at Nisi Prius in 2d Campbell, 420, Lord Ellenborough said as follows:

"Those who have procured an adjudication in the Admiralty Court to another person shall not be permitted here to claim the same property as belonging to themselves." * * * "Parties cannot have the assistance of our Court in carrying on this system of deception, and the plaintiffs cannot maintain an action at law for that which they have

solemnly declared to be the property of the defendant."

The ground of the decision, therefore, was not that De Mello had lent his name to neutralize the property, but that De Metton "had procured the adjudication in the Admiralty Court," and "could not maintain an action at law for that which they have solemnly declared to be the property of the defendant." There is, therefore, no distinction between the cases; for Prioleau "procured the adjudication in the Admiralty Court to another person." He "solemnly declared" the *Wren* to be the property of Laird. He could not then recover it as his own. How can he defend it as his own?

TWELFTH POINT.

The objection of the libellants to the reading of the testimony of James Thomson and to the reading of the bill of sale of the *Wren* was well taken—their reading was error.

If the views heretofore expressed, touching the conclusiveness of the decree in the Prize Court, are correct, it follows that no evidence was admissible in opposition to it.

THIRTEENTH POINT.

Certain evidence was offered by the garnishees which was received under the libellants' objection and exceptions (fols. 181 and 183).

1. The amendment of the answer at the hearing was not authorized.

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2. By the matter set up it was sought to show that the libellants could not recover against Laird—but this the garnishees cannot do in the Admiralty.

Clerk's Praxis, Tit. 30.

3. The matter did not show accord and satisfaction. If it be held to aver satisfaction by England, she is a stranger, and satisfaction by a stranger is no plea.

4. The satisfaction is but partial. The decree against Laird is $144,298. The payment by the United States is $38,958.

Partial satisfaction is no plea.

Murray *vs.* Lovejoy, 2 Cliff, 191.

Nor is payment by a stranger as a gratuity.

Bleakley *vs.* White, 4 Paige, 653.

Nor is satisfaction by one a bar to an action against another for the same tort.

Matthews *vs.* Lawrence, 1 Denio, 212.

Atlantic Dock Co. *vs.* The Mayor, 53 N. Y., 64.

U. Soc. of Shakers *vs.* Underwood, 21 Am. R., 214.

4. The Treaty of Washington was not an adjustment of claims of citizens of either country upon citizens of the other.

Adm. of Whitaker *vs.* English, 1 Borg., (S. C.), 15.

5. The evidence certainly was not pertinent to the question whether or no the garnishees were indebted to Laird, which was the issue then to be tried.

6. It had not been taken in accordance with the rules of this Court for the taking of further proof in the Circuit Court on appeals in admiralty causes.

Supreme Court, rule 49, in Admiralty.

7. The provisions of this rule the Circuit Court was not at liberty to disregard. Before the argument of an appeal in the Circuit Court each party is entitled to know the facts and proofs upon which the cause is to be heard. At the argument neither party is at liberty to come in with fresh proofs and new issues. This is the meaning of rule 49, and is right.

8. This proof was then offered as matter of surprise; it had not been taken by deposition—no notice of it, or of an intention to offer it, had been given.

FOURTEENTH POINT.

To sum up the whole case:

1. The claim averred, that Laird was the true and *bona fide* owner of the *Wren*.

2. "A claimant in a prize cause must be the general owner of the property"—Judge Story.

3. The prize court held the property for the real owner.

"The Court holds the property," says Marshall, J., in Jennings *vs.* Carson, "for whoever has the right."

"The Court is *bound*," says Judge Ware, "not to deliver it but to those who *prove a title*."

"The Court must have power to decide," says Judge Betts, "who is entitled to withdraw the funds from the Registry."

"I cannot restore the ship to the claimants," says Dr. Lushington, "unless they show that they are the sole legal owners."

4. The decree directed that the proceeds of the *Wren* should be restored to John Laird, claimant.

5. The decree of the Court is conclusive of the fact which it decided: "As to whatever the sentence *meant* to decide," says Lord Mansfield, in Bernardi *vs.* Matteux, 2 Dougl., 581, "we must take it as conclusive."

6. Prioleau procured that decree.

7. It was procured by suppressing a fact which is now alleged, and by alleging and urging a fact which is now denied.

8. The fact which is now alleged is contrary to the papers of the *Wren* and the evidence of her master.

9. A party who has worn a garb for his own convenience will not be allowed to throw it off for his advantage. A party who alleges a fact in court shall not thereafter be allowed to deny it.

10. If the facts stated above are correct (and they cannot be disputed), and if the above rules of law are accurate (and every one of them is maintained

by overwhelming authority), the conclusion seems inevitable that the decision of the District Court was correct, and that the decision of the Circuit Court was erroneous, and should, therefore, be reversed.

FIFTEENTH POINT.

We submit, therefore, that the decree of the Circuit Court should be reversed, and the decree of the District Court should be affirmed.

J. LANGDON WARD,
Proctor for Appellants.

ROBERT D. BENEDICT,
Advocate.

APPENDIX.

U. S. District Court.

JOHN N. CUSHING

vs.

JOHN LAIRD, THE YOUNGER.

VI. Ben., 445.

BLATCHFORD, J.: The question in this case, is whether the libellant, under the attachments issued herein, and levied on certain moneys in the hands of Foster & Thomson, as garnishees, are entitled to regard such moneys, for the purposes of such attachments as having been, when such attachments were levied, the moneys of the respondent, John Laird, the younger.

On the 16th of June, 1865, the United States filed a libel, in Admiralty, in the District Court of the United States for the Southern District of Florida, against the Steamer *Wren* and her cargo, alleging, in the libel, that certain persons, citizens of the United States, on the 12th of June, 1865, captured the *Wren* and her cargo on the high seas as prize of war; that the captured property had been brought into Key West, in said District; and that it was lawful prize of war, and subject to condemnation and forfeiture as such. An attachment was issued against the *Wren* and her cargo, and was returned duly executed. A monition, in the usual form, was also

issued, returnable June 27th, and was returned duly executed.

On the 26th of June, 1865, claim and answer, signed "Edward C. Stiles, Master, British Steamer *Wren*," and duly verified, was filed in the cause. It says: "And now comes Edward C. Stiles, and says that he is the master of the said steamer *Wren*, and, as such, is the lawful bailee of said steamer, her tackle, apparel, and furniture, and claims the same for the owner thereof; and he further says that John Laird, a lawful British subject, residing in England, is the true and *bona fide* owner of such steamer, and that no other person is the owner thereof, as appears by the register of said steamer now in possession of the Court, and as he is informed and believes." The answer also denied that the steamer was prize of war, and averred that she had no cargo, and prayed restitution.

On the 15th of August, 1865, a decree was made in the cause in these words: "A claim having been interposed for this vessel and cargo by Edward C. Stiles, master of said vessel, for and on account of John Laird, the younger, a British subject, and this cause having been heard on the libel and proofs, and testimony taken *in preparatorio*, and pleadings of the claimant, and all due proceedings having been had, and the Court being fully advised in the premises, and it appearing to the Court that the said steamer *Wren*, her tackle, apparel, furniture, and cargo were, at the time of capture, the property of enemies of the United States, it is now ordered, adjudged, and decreed that the said steamer *Wren*, her tackle, apparel, furniture, and cargo be condemned and forfeited to the United States as lawful prize of war."

The decree also ordered a sale of the property.

From the testimony in the prize cause, it appears that the main question in issue was, whether the *Wren*, belonged to Laird, a subject of Great Britain, residing in Liverpool, and was *bona fide* neutral property, or whether she was really the property of the Government

of the Confederate States, or of the firm of Frazer, Trenholm & Co., acting for and representing such Government. A certificate of registry was found on board of the *Wren*, at the time of her seizure, dated at Liverpool, December 24th, 1864, signed by a registrar, which specified December 24th, 1864, as the date of registry, and stated that the *Wren* was British built, and was built by Laird Bro's., at Birkenhead, in 1864, that her port of registry was Liverpool, that John Laird the younger, of Birkenhead, shipbuilder, was the owner of the whole of her, and that William Raisbeck was her master. The *Wren* when seized was on a voyage from Havana to Halifax and Liverpool. She was seized by persons forming part of her crew. She had previously been engaged in running the blockade into Galveston, Texas, from Havana, and a short time before she began the voyage on which she was seized she had entered the port of Galveston, discharged a cargo, taken one of cotton on board, and carried it safely to Havana.

From the decree of the Prize Court an appeal was taken, on behalf of the claimant, to the Supreme Court of the United States. On the 16th of October, 1865, a writ of sale was issued, under which the vessel was sold. The proceeds of sale, amounting to $37,108·50, were deposited with the Assistant Treasurer of the United States at New York.

The appeal was heard by the Supreme Court, and it reversed the decree of the Court below.

The case is reported in 6 *Wallace*, 582. In the decision of the Supreme Court, as reported, the question is stated to be whether the vessel was the property of the enemies of the United States. It is also stated therein that the certificate of registry shows that "the claimant (Laird) is the builder of the vessel and owner:" that "the proofs show, with reasonable certainty, that his (Laird's) registered master brought the vessel to Havana, and was there engaged in command of her within three months after she was launched and fully equipped for the voyage, and which was within three months of

the time when she was seized as prize by her crew." The decision proceeds: "It is quite apparent, therefore, upon the proofs, that the claimant Laird not only built the vessel, but put his master in command in this, her first voyage, and the presumption would seem very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months which elapsed after she was built and before the seizure took place. In addition to this, she was in the command of a master, Stiles, claiming to represent Laird as owner. These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the claimant." The decision, then, after holding that most of the proofs relied on to disprove such evidence were "inadmissible and incompetent as testimony in a court of justice," because they did "not rise to the character or dignity of testimony in any Court that respects the law of evidence," goes on to say: "We agree that in the facts and circumstances surrounding and attending the history and operations of this vessel, and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture, as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and, as she entered immediately on furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unreasonable to suspect that the so-called Confederate States, or their agents, had some connection, if not interest in her. But this alone is not evidence on which to found a judgment, in the administration of justice. The facts that the master, Stiles, who was put in command of her for the voyage home from Havana to Liverpool, was an officer in the enemies' naval service, and had belonged to the United States Navy, and Helms, who was, in some way not explained, connected with her voyages on running the blockade, and who was the agent of the enemy at Havana, might well be entitled to consideration and weight on the question, if there had been any legal

proof in the case laying a foundation for such a conclusion. So, also, would the evidence that Stiles destroyed, at the time of the capture, a letter from Helms, agent of the ship, as he calls him, to himself, and an order for the payment to him of £40, on the delivery of the ship at Liverpool. But, in the view we have taken of the case, there is no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest, or be attached, as auxiliary considerations, to influence the judgment of a Court."

From the language of the decision of the Supreme Court, it is apparent that from the fact that Laird built the vessel, and that she was registered in his name as builder and owner, and that the master named in the certificate of registry brought her from Liverpool to Havana, and was in command of her at a time less than three months after her registry and less than three months before her seizure, the Court presumed, because there was no competent evidence to the contrary, that Laird continued to be the owner of the vessel at her seizure, especially as Stiles claimed to represent Laird as owner. On this the Court concluded that, as Laird was a British subject, and was not shown to be the representative or agent of the Confederate Government, the vessel was not enemies' property at the time of her seizure. It is also apparent that the Court thought that, on the facts and circumstances disclosed by the proofs, there was good ground for suspicion that the Confederate Government, or its agents, had some connection with, or interest in, the vessel, but that there was no legal proof of the existence of such connection or interest, so as to uphold the decree condemning the vessel as enemies' property.

The master, Stiles, in his deposition in the prize case, in answer to the interrogatories in prize, states that the vessel belonged to one Laird, Junior, as he inferred from the register, and was informed; that "he believes that one Laird, Junior, was owner of the vessel at the time she was seized"; that "he only knows that from

the register," and that "the deponent was engaged to take the vessel to Liverpool and deliver her there to Frazer, Trenholm & Co." The master, also, in that deposition speaks of Helms as "the agent of the vessel at Havana;" and the Supreme Court, in its decision, speaks of Helms as "the agent of the enemy at Havana."

It appears, by evidence in the present case, that Foster & Thomson, after the decree of condemnation was made, were retained by one Charles K. Prioleau, who has for many years been a member of the firm of Frazer, Trenholm & Co., to attend, on behalf of Prioleau, to the prosecution of the appeal to the Supreme Court. Foster & Thomson do not know Laird, and never saw him, and never had any communication or correspondence with him, written or verbal. On that retainer Foster & Thomson caused the transcript of the record on the appeal from the District Court in Florida to be sent to the Supreme Court, and made the necessary deposit of money with the Clerk of the latter Court, and employed counsel to argue, and who did argue, the appeal in the Supreme Court, and they have paid such counsel for his services.

The brief of such counsel, filed in the Spreme Court on the appeal, asserts it to be shown by the record that the *Wren* was never sold or transferred, and was owned by Laird, the younger, at the time of her seizure; that she was owned in England by an Englishman and had never been owned by any one else; that she was at all times the property of a British neutral; and that, therefore, she was never the property of enemies of the United States. It was not disclosed to the Supreme Court by Foster & Thompson, or by Prioleau, that, prior to the seizure of the vessel, Laird had parted with all his interest in the vessel, or had sold and conveyed her to Prioleau, or that Prioleau had any interest in her at the time of her seizure.

The case was decided by the Supreme Court on the 23d of March, 1868. The mandate of that Court designates the suit as one between the United States,

libellants, and "the steamer *Wren* and cargo, and E. C. Stiles, claimant, respondents." It recites the decree of the District Court in the suit, and then orders that such decree be reversed, and that the cause be remanded to such District Court "with directions to restore the vessel and cargo to the claimant, but without costs," and then commands such District Court that such further proceedings be had in the cause, in conformity to the opinion and decree of the Supreme Court, as ought to be had.

Foster & Thomson received such mandate, and then drew a power of attorney to be executed by Laird and Stiles, and caused it to be sent to Prioleau, with instructions that he should procure it to be executed by Laird and Stiles, and should cause it to be returned to Foster & Thomson. It was so executed. It bears date July 2d, 1868, and was returned, executed, to Foster & Thomson. By its terms Laird and Stiles appoint Foster & Thomson their attorneys, "to receive and collect from the United States Government, or any branch or officer thereof, or any depositary thereof, any and all moneys, the avails or proceeds of the sale of the steamer *Wren* and her cargo, sold under decree of the District or Circuit Court of the United States at Key West, in the Southern District of Florida, by the Marshal of the United States for the said District, the said decree having been reversed by the Supreme Court of the United States, on appeal, and this power having been given to our said attorneys for receiving restitution of the avails of the said steamer *Wren* and cargo."

On the 28th of December, 1868, the libellants in this suit filed in the District Court of the United States for the Southern District of Florida a libel, in Admiralty, against John Laird, the younger, for the same cause of action that is sued on in this suit, and praying the same relief. On the 5th of January, 1869, Foster & Thomson wrote to Mr. Dockray, an attorney in Florida, advising him of such suit in Florida, and employing him to obtain for them the funds in Court in the *Wren* case, and directing him not to enter a general appearance for

Laird in the suit in Florida, but only to move specially to set aside the process and any attachment against the *Wren* fund. On the 6th of January, 1869, the Court in Florida ordered process to issue in such suit returnable on the 3d of May, 1869. Such process was issued on the 7th of January, 1869, and was a warrant of arrest bailable in the sum of $44,622. On the same day such warrant was returned, not served. On the 26th of January, 1869, Foster & Thomson sent to Mr. Dockray a copy of the said power of attorney from Laird and Stiles, in a letter to him, which said: "We lay stress on this, as the particular object we have in the matter is to receive the money under it," the power of attorney "and we wish to have the Judge's check so drawn, that we, as attorneys, may collect it." On the 20th of February, 1869, in the suit in Florida against Laird, an attachment was issued against the proceeds of sale of the steamer *Wren*, now on deposit with the Assistant Treasurer of the United States in the City of New York, and subject to the order of this Court," returnable May 3d, 1869. This attachment was executed by serving a copy thereof on the 4th of March, 1869, on the Assistant Treasurer of the United States at New York. On the same 20th of February, 1869, a monition in the suit in Florida against Laird was issued, returnable May 3d, 1869, and was afterwards returned as served by publication in a newspaper published at Key West, and by posting there. Negotiations took place between Foster & Thomson and Mr. Ward, who represented the libellants in the suit in Florida against Laird, and who also represents them in this suit, respecting a disposition of the *Wren* funds which should transfer them to the city of New York in such manner that process of attachment in this suit should be served on them, and, on the 24th of February, 1869, Foster & Thomson wrote to Ward suggesting that the District Judge in Florida should forward to them his check on the Assistant Treasurer in New York for the proceeds of the *Wren*, and that they should draw the funds under their

authority from "the claimants, Laird and Stiles," and keep the proceeds in their hands sufficiently long to enable Mr. Ward to serve upon them such process or papers as he might be advised. This proposal appears to have been substantially agreed to by Mr. Ward, for, on the 12th of March, 1869, he wrote to Mr. Bethel, his attorney at Key West, directing him to "make no objection to the forwarding by the Judge," to Foster & Thomson, "of the check for the proceeds of the *Wren*, in accordance with the mandate of the Supreme Court," and saying: "Until otherwise advised, hold the suit where it is, staying further proceedings for the present, but do not discontinue. If necessary to enable the Court to forward the check, stipulate as may be proper. I enclose a copy of a letter from Messrs. Foster & Thomson to their attorney" (the letter of March 13th to Mr. Dockray, next mentioned) "for your information. Advise me by telegraph the day the check leaves Key West." On the 13th of March, 1869, Foster & Thomson wrote to Mr. Dockray, advising him that Mr. Ward had decided to make no objection to the forwarding by the Judge to them of his check for the money, and enclosing to him a copy of the letter of the 12th from Mr. Ward to Mr. Bethel, and directing him to obtain the check payable to their order and to forward it to them. On the 18th of March, 1869, Dockray, who was Attorney of the United States for the Southern District of Florida, wrote to Foster & Thomson, saying: "In the case of the steamer *Wren*, John Laird, owner, etc., I would have written you several weeks ago, if I was at liberty to take any action in your interest. While representing the Government, and bound by the instructions of the Attorney-General, it has not been possible for me to serve you, as indicated in yours of the 5th of January last. Before the mandate of the Supreme Court of the United States reached the Clerk of the Court at Key West, the acting United States Attorney had filed a petition, in a cause of possession, against the proceeds of

the sale of the *Wren*, the monition being returnable December 1st, 1868. The Attorney-General, however, directed that no default be taken, nor any other steps, without further instructions. The matter seems to be in shape to enable you to secure the benefit of the mandate of the Supreme Court of the United States by proper management. It is certainly my duty to obey the terms of the decree of the Supreme Court, as it also is to promptly and efficiently execute any instructions I may receive from the Attorney-General. If you will communicate with Senator Osborn, of Florida, at Washington, immediately, you may be able to obtain definite instructions to be forwarded me from the office of the Attorney-General. I am precluded at present from taking any steps without further directions." On the 25th of March, 1869, Foster & Thomson wrote to Mr. Dockray, saying that they had been informed that directions had been sent from the office of the Attorney-General to discontinue the suit brought in behalf of the United States against the proceeds of the *Wren*, and adding: "These directions, together with the withdrawal of opposition by Messrs. Cushing, will, no doubt, enable you to obtain and forward the judge's check to our order." On the 26th of March, 1869, Mr. Dockray wrote to Foster & Thomson, saying that he should move to set aside the process and attachment in the suit brought by these libellants against Laird, in Florida, for want of jurisdiction. On the 13th of April, 1869, the mandate of the Supreme Court, and a certified copy of the power of attorney from Laird and Stiles to Foster & Thompson, were filed in the court in Florida, the latter paper being filed by Mr. Dockray. Some delay took place in the receipt by Mr. Dockray of the instructions from the office of the Attorney-General to discontinue the proceeding in the suit referred to, but they were received by him on or before the 8th of May, 1869. On that day Mr. Ward telegraphed to Mr. Bethel directing him to consent absolutely to forwarding to Foster & Thomson the judge's check for the proceeds

of the *Wren* drawn to their order and to require no bond or stipulation. On the same day Mr. Dockray, in the Prize Court in Florida, in the prize case as attorney and proctor for John Laird, claimant, "exhibited to the court the mandate of the Supreme Court, and moved for a final decree in accordance with the requirements of the mandate. On the same day, in the suit in Florida brought by these libellants against Laird, a paper was filed in the court, entitled in the suit, and signed "John Laird, by F. A. Dockray, att'y, and proctor" and reading thus: "And now comes John Laird, the respondent in this cause, and makes his general appearance herein, and claims the proceeds in the registry of this court as attached in this suit." The record of the court states that such appearance and claim was filed by Laird; on the same day, in the same suit, a paper was filed in the court, entitled in the suit, and signed, "John Laird, by F. A. Dockray, att'y and proctor," and reading thus: "And, now comes John Laird, by his attorney and proctor, F. A. Dockray, and moves the court for an order dissolving the attachment herein." Appended to, and filed with this paper, was a consent signed by Mr. Bethel's firm as proctors for the libellants consenting to such motion, "absolutely and without stipulation or bond." On the 10th of May, 1869, in the same suit, an order was entered, entitled in the suit reciting that, "John Laird, respondent herein, by F. A. Dockray, his attorney and proctor," had moved for a dissolution of the attachment, and that the libellents by their attorneys and proctors had, in writing, filed, consented thereto absolutely and without stipulation or bond, and ordering, "that the attachment issued out of this court, upon the proceeds of the sale of the steamer *Wren*, now on deposit with the Assistant Treasurer of the United States at New York, be dissolved."

On the same day, in the Prize Court, in Florida, in the prize case, a decree was entered, reciting the former decree, and the appeal to the Supreme Court, and

the action of that court, and the filing of its mandate, and stating that the costs and expenses in the proceeding, amounting to $5,666.88, had been taxed and paid to the officers of the court entitled thereto, out of the proceeds of the sale of the steamer *Wren*, and then, "on motion of F. A. Dockray, attorney and proctor of John Laird, claimant," decreeing that the remainder of the proceeds of the steamer *Wren*, amounting to the sum of $31,441.62, on deposit with the Assistant Treasurer of the United States at New York, and subject to the order of the court, "be paid to the said John Laird, claimant," and further stating that it appeared to the court, "that Foster & Thomson, of the City of New York, are the lawfully authorized attorneys in fact of the said John Laird, claimant," and then decreeing "that the said proceeds be paid to the said Foster & Thomson." The record of the court then proceeds: "Whereupon checks No. 199, for $29,869.62; and No. 200, for $1,572.00; were drawn in favor of Foster & Thomson, of New York, attorneys for Laird and Stiles, as against the proceeds of the steamer *Wren*, on deposit with the Assistant Treasurer of the United States at New York, which checks were delivered to F. A Dockray, Esq., attorney for Foster & Thomson, and attorney in fact for John Laird, and his receipt therefor taken." The receipt is entitled in the prize suit, and is signed, "F. A. Dockray, att'y for Foster & Thomson, of New York, attorney in fact for John Laird, claimant," and is a receipt for the two checks as drawn by the Judge on the Assistant Treasurer and payable to the order of Foster & Thomson. On the 10th of May, 1869, Dockray wrote to Foster & Thomson, enclosing to them the two checks and advising them that he would write to them next day in full, and send to them certified copies of the proceedings had on the dissolution of the attachment. That letter and the two checks were received by Foster & Thomson on the 19th of May, 1869, and on that day the amount of the larger check of the two was paid to

Foster & Thomson by the Assistant Treasurer. The amount of the smaller check was paid to them a few days afterwards. After the larger check had been paid, Foster & Thomson received from Dockray a letter dated May 11th, 1869, advising them that he induced Mr. Bethel's firm to consent to the motion for the dissolution of the attachment, by himself agreeing to enter a general appearance for Laird, and stating his reasons for so doing, and sending to them a certified copy of the proceedings.

The funds so in the hands of Foster & Thomson are the funds which have been attached in this suit as the funds of the respondent Laird.

It is not shown that Prioleau or his agents ever informed the Prize Court in Florida that, prior to the seizure of the *Wren*, Laird had parted with all his interest in the vessel, or had sold and conveyed her to Prioleau, or that Prioleau had any interest in her at the time of her seizure, or claimed any interest in her proceeds which that court was restoring; or that any such information was given by Prioleau or his agents to Mr. Ward or to the libellants prior to the receipt of the fund by Foster & Thomson. It is now set up by Foster & Thomson that in all their transactions respecting this matter, from the commencement of their connection with it, they were acting on behalf of Prioleau, and not of Laird; that they so acted in procuring a reversal by the Supreme Court of the decree condemning the vessel, and in obtaining the money from the Prize Court; and that they knew throughout of Mr. Prioleau's having been for many years a member of the firm of Frazer, Trenholm & Co. The inadmissible and incompetent testimony referred to by the Supreme Court in its decision was apart of the depositions *in preparatorio*, of persons on board of the vessel, and was presented as tending to show ownership of the vessel in Frazer, Trenholm & Co. on behalf of and as agents of the Confederate States. It consisted partly of the statement of one witness that he believed that Frazer,

Trenholm & Co. were the owners of the vessel at the time she was seized, that he had heard Helms at Havana (the same person who is spoken of by the Supreme Court, in its decision, as the agent of the "enemy" at Havana) speak of Frazer, Trenholm & Co., as the owners of the vessel, that he believed the real and true property of the vessel to be in Frazer, Trenholm & Co. and that he had heard Helms say that he was the agent of Frazer, Trenholm & Co. for the *Wren*, and other steamers at Havana; and of the statement of another witness, that he believed the vessel was the property of the Confederate States, and that he so believed from what he had heard her former master say, with whom he had sailed in her.

As evidence of the fact that Prioleau and not Laird, at all times at and after the seizure of the vessel, owned her, and that Foster & Thomson are at liberty to maintain that they hold for Prioleau and not for Laird the moneys which they received from the Prize Court in Florida, there is produced to the Court the original of an instrument signed by the respondent Laird, as "John Laird, Jr.," and dated January 3d, 1865, whereby he, described therein as "John Laird, the younger, of Birkenhead, in the County of Chester, shipbuilder," in consideration of £15,450, paid to him "by Charles Kuhn Prioleau, of Liverpool, in the County of Lancaster, merchant," transfers "sixty-four sixty-fourth shares" in the *Wren* to Prioleau, and covenants that she is free from incumbrances. This bill of sale was registered in the Custom House at Liverpool, May 1, 1865.

On the part of Prioleau, acting through Foster & Thomson, it is contended that, under this process of garnishment, the libellants have no greater rights against Foster & Thomson than Laird himself would have against them as respects the funds in their hands; that, if Laird could not recover the funds from them, or from Prioleau, such funds cannot be held under the attachment in this case against Laird; that, inasmuch as Laird sold the vessel to Prioleau, Laird could not

recover these funds from Foster & Thomson or from Prioleau; that the question is merely one as to who in fact owns the funds; that the proceedings in the prize suit do not estop Prioleau from showing in this suit that he really owns the funds, and owned the vessel when she was seized; that the libellants have no more right to insist on such estoppel than Laird would have if he were seeking to recover these funds from Prioleau; and that neither the original decree of the Prize Court, nor the decree of the Supreme Court, was a decree that Laird owned the *Wren* when she was seized, or that Prioleau did not then own her.

It clearly appears, by the language of the decree of condemnation made by the Prize Court, that it condemned the *Wren*, as lawful prize of war, on the ground that she was, at the time of her capture, the property of enemies of the United States. The claim put in on behalf of Laird had averred that Laird, "a lawful British subject, residing in England, is the true and *bona fide* owner of said steamer, and that no other person is the owner thereof." The decree necessarily negatived this averment of the claim, and, in declaring that the vessel was "the property of enemies of the United States," declared that she was not the property of Laird. On the appeal, the Supreme Court, as appears from its decision, not only decided that there was no legal proof that the vessel was owned by the Confederate States or their agents, but also decided that there was strong evidence that the title to her was in Laird, who is called by the Court "the claimant," and that he owned her. From the whole case it is manifest that the Supreme Court, on the appeal taken on behalf of Laird, in order to find that the vessel was not enemy property, was obliged to find, and did find, that the vessel was the property of Laird, the claimant of her. The decree of the Supreme Court reversed the decree of the District Court, that is declared, in reversal of the latter decree, that the vessel was at the time of her capture not the property of enemies of

the United States, and remanded the case with directions to restore the vessel to the claimant. The claimant was Laird, who claimed as owner, and Prioleau through Foster & Thomson, as is shown, in fact procured the Prize Court to make a decree that the $31,441.62 be paid to "John Laird, claimant," that is, to John Laird, by virtue of his claim filed in the Prize Court, which was a claim to the vessel as her "true and *bona fide* owner," and such a decree was made.

In the prize suit, if Prioleau had, in fact, an interest in the vessel, he could have interposed a claim, and put himself in a position, on the record, to contest the prosecution in the Prize Court, and to be a direct party to an appeal. If, in fact, he became the owner of the vessel ten days after her registry, so that he owned her substantially during the whole of her career, he was most clearly a party to the suit *in rem* against her, and *Laird was no* party. Notice of the suit by attachment and publication, if notice to the owner, was notice to Prioleau. Notice to Stiles, the master, was notice to Prioleau, the real owner. In this view Prioleau is bound by the record of the proceedings in the Prize Court (Croudson *vs.* Leonard, 4 Cranch, 434, 437.) The attachment of the vessel in the prize suit was notice to her owner, and, therefore, notice to Priolean as such owner; and he was a party to that suit, and the decision in the suit binds him, and is conclusive as against him and cannot be re-examined in this suit.

> The *Mary*, 9 Cranch, 126-144.
> Bradstreet *vs.* The Neptune Insurance Co., 3 Sumner, 600.

But beyond this principle, it clearly appearing that Prioleau, through Foster & Thomson, actually prosecuted the appeal in the Supreme Court, and procured that Court and the Prize Court to declare that the averment of ownership in Laird, made in the claim and answer in the prize suit was true, and consequently, that his,

Prioleau's, present claim of ownership had no foundation, and that he also procured the Prize Court to restore the money, the proceeds of the sale of the vessel, to Laird, as owner, Prioleau is estopped from denying in this suit that Laird was such owner.

Prioleau did not disclose his ownership to the Supreme Court or to the Prize Court. His assertion now is that he owned the vessel when she was seized. If his claim now were that his interest in her accrued after her seizure, there might, perhaps, be some reason for entertaining a more favorable view of his position. But he permitted Stiles to conceal the true ownership of the vessel, and to assert a falsehood to the Prize Court. That falsehood was asserted nearly six months after the transfer to Prioleau, and nearly two months after the entry of the transfer at the Custom House in Liverpool. Prioleau also permitted the vessel to be sailing with a certificate of registry showing that Laird was her owner, at a time when Prioleau was her owner by bill of sale from Laird, and when such bill of sale had been entered in the Custom House, where the original registry in the name of Laird, as owner, was made. In a case of libel, as prize of war, the burden of proving the neutral ownership of the vessel being upon the claimant, the papers of the vessel are allowed to be evidence on the question of such ownership, and the claimant, being thus permitted to resort to them, is bound to see that they are true papers. The British Merchant Shipping Act of 1854 (17 and 18 Vict., ch. 104) provides (§ 57) that every bill of sale for the transfer of any registered ship, when duly executed, shall be produced to the registrar of the port at which the ship is registered, with a declaration made by the transferee under Section 56, and that the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship comprised in the bill of sale, and shall endorse on the bill of sale the fact of such entry having been made, with the date and hour thereof. In the present case this was done, and the name of Prioleau was

entered in the register book, in the office of the registrar, in the Custom House at Liverpool, as the owner of the *Wren*, on the 1st of May, 1865. The Act also provides (§ 88) that if, on any change of ownership in the vessel, the owner desires to have the vessel registered anew, it shall be lawful for the registrar of the port at which the ship is already registered, on the delivery up to him of the existing certificate of registry and on compliance with such of the other requisites to registry as the registrar thinks material to make such registry anew, and grant a certificate thereof. Prioleau therefore might easily within the five months and a half which elapsed between the date of the bill of sale and the seizure of the *Wren* have procured for that vessel a certificate of registry showing the ownership of her by Prioleau, and which, if on board of her at her seizure, as it ought to have been, would have made it impossible for the Supreme Court to decide that Laird was her owner, based as that decision was solely upon the certificate of registry found on board. Is it possible that a Court of the United States can be seriously invoked to sustain Prioleau in committing a fraud of this character on another Court of the United States and to aid him in securing the funds of the fraud? If Prioleau had disclosed to the Supreme Court, or to the Prize Court, the fact that the certificate of registry found on board of the *Wren* did not state her true ownership at the time of her seizure, is it not entirely clear that the decree of condemnation would not have been reversed? Prioleau must be held to be barred from the privilege of now denying what he asserted in those Courts, and of now asserting what he denied in those Courts. As between him and the Courts of the United States and these libellants, the vessel and her proceeds belong to Laird, whatever might be adjudged in regard to such proceeds, if either Laird or Prioleau were seeking to recover such proceeds from the possession of the other.

There is another view of the case. The agents of Prioleau did not disclose to Mr. Ward that the funds belonged

to Prioleau and did not belong to Laird. If they had disclosed to him their intention when the funds should be released from the attachment in the Florida Court, and be transferred from the custody of that Court in prize, and should reach their hands, to set up that the funds did not belong to Laird, but belonged to Prioleau, is it on the state of proofs now disclosed to be imagined that Mr. Ward would have consented to release the attachment. The libellants, represented by Mr. Ward, are entitled to have this Court act upon the matter, as the Court in Florida would have acted upon it if it had been made known to that Court before the delivery of the funds to Foster & Thomson, and before the release of the attachment, that Prioleau was the owner of the vessel when she was seized. Is it to be imagined that that Court would have delivered the funds to Prioleau or would have discharged the attachment, as one which while issued against funds belonging to Laird, had been levied on funds belonging to Prioleau? And yet this Court is asked to deliver the funds to Prioleau, and to hold them not to have been properly levied on as the funds of Laird. This case falls directly within the principle which holds a party concluded by his acts and admissions on the faith of which a court of justice has been led to adopt a particular cause of proceeding (1 Greenleaf on Evidence, § 204).

In the foregoing views I have proceeded on the ground that in fact Foster & Thomson have regarded themselves as acting throughout for Prioleau and not for Laird, and have acted throughout for Prioleau as against Laird. But it is such very action which estops them and Prioleau from now saying that the money is not Laird's money. As between them and the Court in Florida and the Supreme Court and these libellants, Foster & Thomson received the money as Laird's money, and not as Prioleau's money. And, if they were to claim to hold it for Laird as against Prioleau, it would seem, on the authority of the case of *De Mettou vs. De Mello* (12 East., 234), that Prioleau could not recover it from them,

he having colluded with Laird and Stiles to make the vessel appear to be the property of Laird and not the property of Prioleau, a member of the firm of Frazer, Trenholm & Co., and to set up a false defence in the courts of the United States, and to deceive and impose upon such Courts.

I must, therefore, hold that, for the purposes of the attachments levied in this suit, the monies levied on thereunder in the hands of Foster & Thomson were the moneys of the respondent.

SUPREME COURT U.S.
FILED
JAN 18 1882
JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

No. 197—OCTOBER TERM, 1881.

JOHN N. CUSHING ET AL., APPELLANTS,

vs.

JOHN LAIRD, THE YOUNGER,

FOSTER & THOMSON, GARNISHEES.

APPELLANTS' SUPPLEMENTAL BRIEF.

Supreme Court

OF THE UNITED STATES.

JOHN N. CUSHING, *et al.*,
Appellants.
vs.
JOHN LAIRD, THE YOUNGER,
FOSTER & THOMSON, *Garnishees.*

No. 197,
Oct. Term, 1881.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

After an examination of the two briefs filed by the Counsel for the garnishees we desire to add to our brief in this case two additional assignments of error and a brief in reply.

STATEMENT OF ERRORS.

I. The Circuit Court erred in inserting in the decree in this cause the following, viz.:

"It is now considered, ordered, adjudged, and decreed "by this Court that the decree or order of April 26th, "1873, adjudging that the proceeds of the steamer "*Wren* in the hands of the garnishees, belonged to "Laird, was interlocutory only; that it settled the title "to the fund for the purposes of the suit, but did not "adjudge that it be paid to the libellants, and that no "actual appropriation of the fund was made by the

"said District Court until the decree of September "19th, 1873, and that this last is the final decree from "which only an appeal could be taken to the Circuit "Court.

"It is, therefore, hereby ordered and adjudged that "the appeal of said garnishees then first in order of "time in said cause taken by them from said decree of "April 26th, 1873, be and the same is hereby dis-"missed, and that the libellants and appellees recover "from the said garnishees, J. P. Giraud Foster and "James Thomson, their costs on the said appeal to the "Circuit Court, to be taxed, and as taxed amounting to "the sum of one hundred and thirty-three dollars and "sixty cents, and that said libellants have execution "therefor, unless an appeal be taken from this provision "of the decree after the entry thereof within the time "limited by law and the rules and practice of the Court "so as to operate as a supersedeas."

It is claimed by the Counsel for the garnishees (Van Santvoord's brief, p. 36) that Judge Johnson allowed the proposed amendment to the answer of the garnishees, and that such amendment was allowed to stand by the Chief Justice on the trial of the cause.

We do not understand that these are the facts. We deny that such amendment was either allowed by Judge Johnson, or allowed to stand by the Chief Justice; but if we are mistaken in this, then we desire to make as an assignment of error—

II. That the Chief Justice erred in allowing the proposed amendment to the answer of the gasnishees, at fol. 182.

POINTS.

I.

As to the first of these new assignments of error we say as follows:

a. As appears from the opinion of the Court and from the decree itself, there were two appeals pending before the Court, taken at different times, docketed, moved, and heard as separate causes, and having different records.

b. The entry of a single decree in both causes was, therefore, a matter not within the discretionary power of the Court, and was clearly wrong.

The injection of a decree in one cause into the decree in the other was irregular and an error, for which the decree should be reversed.

c. No such question was raised *in this cause*. No such question was argued by counsel in this cause. No such question was before the Court for consideration. No such order therefore could properly be inserted in the decree.

II.

As to the second assignment of error we deny that any such amendment was allowed by Judge Johnson, or by the Chief Justice. It appears (fol. 182) that Judge Johnson, when the motion was made, ordered that the "amendment be allowed

subject to final decision." No final decision was ever made on that motion. Judge Johnson died without deciding.

On the trial before the Chief Justice he ordered "that the motion of the appellants to amend their answer, made Oct. 25, 1877, *stand for hearing* in the same manner it did before Judge Johnson at the time of his death." No order upon that motion was ever made by the Chief Justice. The motion therefore never was granted, and the answer of the garnishees has never been amended, but stands as it stood on the trial in the District Court.

This Court cannot allow the amendment and then apply the facts found. It can only reverse the decree and remand the case if it deems the amendment proper to be allowed.

The *Edward*. 1 Wheat., 261.

In answer to the brief of Mr. Van Santvoord we make the following suggestions:

a. Mr. Van Santvoord in his brief (p. 19) avers that the title to the *Wren* vested in Prioleau, of date 1st May, 1865, and that this was "not controverted nor controvertible." This is doubly an error.

If the title vested in Prioleau at all it vested as of January 3, 1865, the date of the delivery of the bill of sale.

But, that it vested at all, on either date, was controverted in the Circuit Court and controverted on our first brief in this Court (see brief p. 46), and as we think successfully. Certainly no answer to our argument is to be found in the brief for the appellees.

b. The fact that Prioleau's title was not noted on the certificate of registry (p. 19) is doubtless easily accounted for. The fact averred by the counsel as the reason may sufficiently account for it under the British Merchants' Shipping Act.

But, under the law of prize, the fact which he avers would have had no weight to excuse the failure to comply with the first principles of the prize law, viz.: That a vessel shall tell the truth about herself. And, under that law, the failure to note the change of title on the register would have been "ground of culpability," which, whether it would "affect the title" or not, would have insured the condemnation of the vessel.

c. The counsel adds, "That the master in charge did not know of the change was a mere accident, arising from his being placed in command in Havana."

The fact of the master's being placed in command in Havana is doubtless true. But the Circuit Judge refused to find that fact when requested by the libellants (Record p. 213).

We fail to see how that fact shows that the master did not know of the change.

Nor do we see how, in the absence of any finding of that sort, the counsel can argue that the master did *not* know of such change, if it was made.

For our part we stand on the ancient principle of the prize law, that "the master at least should be privy to the truth of the transaction."

And we insist, that under this principle, this Court will presume that Stiles, wherever and whenever appointed master, was privy to the real truth of the transaction.

If what he swore to was the truth of the transaction, then the vessel was the property of Laird, notwithstanding the bill of sale to Prioleau.

If what he swore to was not the truth, then he was the agent of Prioleau, and as Prioleau's agent he averred the falsehood. Prioleau having obtained the benefit of that averment, cannot be heard to deny that it was the truth.

d. The counsel having himself reasoned from an allegation which is not contained in the findings of the Circuit Judge, but in the evidence in the record in the prize cause, proceeds, not very consistently, to say (p. 20) that to refer to that evidence is not permitted.

And to sustain his proposition he cites Fitz simmons *vs.* The Newport Insurance Company (4 Cranch, 192). The authority is not applicable. In that case a special verdict had been found, and counsel was not allowed to read to the jury the evidence on which it was found.

But this falls very far short of establishing that the Circuit Judge was wrong in holding, as he did (opinion, p. 214), that the evidence in the prize cause and the opinion of the Court "may be referred to for the purpose of ascertaining what was actually decided there, if the record leaves that question otherwise in doubt."

As the garnishees have not appealed, we suppose they cannot question the correctness of this ruling. But the ruling is fully sustained.

"It is obvious that to prove what was the point at issue in a previous action at common law, itis necessaryto produce the entire record."

1 Greenleaf on Ev., p. 703, note.

e. The brief (foot of p. 20) avers that the only fact of which "as an adjudication," the decree of the Supreme Court is evidence, "is the negation of any ground of condemnation of the *Wren* as enemy property or prize of war."

If it is that and nothing more, it is the negation of any title of Prioleau in the *Wren*.

The question of prize or no prize depended solely on the question of title. Title in him was a ground of condemnation of the *Wren* as enemy property. Title in him made the *Wren* prize of war.

If that decree is evidence of that fact, it is conclusive evidence of it—a conclusive negation of any title by Prioleau in the *Wren* or in her proceeds.

And if there is no title to them in Prioleau, then there is proof in the giving of the power of attorney by Laird to draw these funds (which was the exercise of an act of ownership over them), and in the averment in the letter of Foster & Thomson (Record, p. 215), that Laird was the owner, to fully sustain the decree of the District Court that the funds were Laird's property.

f. But counsel is not content with averring, as a basis of argument, facts not contained in the findings of the Court below. He avers in a similar way one fact not contained in either allegation, evidence, or finding, viz., that Prioleau was an Englishman (brief, p. 27), on which ground he avers that Prioleau was "less offensive to the Court than Laird, and not less a neutral by reason of his having been a member of the firm of Fraser, Trenholm & Co., if the fact were so."

That this fact was so is found by the Court below. That he was a neutral of any kind is not found.

And we submit that, instead of the counsel's averment, the true one would be this: "Prioleau was more offensive to the Court than Laird, by reason of his being a member of the firm of Fraser, Trenholm & Co., who were not only agents of the Confederate Government, but a branch of the house of John Fraser & Co., of Charleston, and he was none the less offensive by reason of his being a neutral, if the fact were so."

It seems to us utterly futile to suggest any reason for Prioleau's concealment of his interest in the *Wren* and his averment that she was

Laird's property, except the consciousness, from which it seems to us that not even his present counsel can be free, and from which no one else who has any knowledge of the history of the Rebellion can be free, that the knowledge of any ownership of the *Wren* by him would have inevitably insured her condemnation as enemy property.

This matter of the status of Prioleau as a member of the firm of Fraser, Trenholm & Co., and of the status of Fraser, Trenholm & Co., is a matter of history of which the Courts will take judical cognizance. It was stated by this Court in the case of *The Bermuda*, 3 Wallace, 544; it was stated in the case of the United States at Geneva as follows:

"It so happened that there was at Charles-
"ton, at that time, a well-established com-
"mercial house, doing business under the
"name of John Fraser & Co. The head of
"this firm was George A. Trenholm, of
"Charleston. Another prominent member
"was Charles K. Prioleau, also a citizen of
"the United States. Before or about the
"time the insurrection broke out, and, as
"the United States believe in anticipation of
"it, this house established a branch in Liver-
"pool, under the name of Fraser, Trenholm
"& Co. Prioleau was dispatched thither to
"take charge of the Liverpool business, and
"became, for purposes that may easily be
"imagined, a naturalized British subject.
"George A. Trenholm remained in Charles-
"ton, and, in due course of time, became
"the secretary of the insurgent treasury, and
"a member of the so-called Government at
"Richmond, * * * and under the name
"of 'depositories' Fraser, Trenholm & Co.,
"remained a branch of the treasury of the
"insurgent government:"

And in the counter case of Great Britain:

"It is now well known that, as its "financial agents for this and other purposes "it, (the Confederate Government) employed "the mercantile house of Fraser, Trenholm "& Co., which was established at Liverpool "in connection with the firm at Charleston."

See also diplomatic correspondence referred to in the case of *The Bermuda*.

In the face of these facts of history, so notorious and undisputed, it seems to us to show either a sublime ignorance or a sublime boldness on the part of counsel for the garnishees, when we find him stating that if "the fact were that Prioleau was a member of the firm of Fraser, Trenholm & Co., there was nothing in this fact to charge Prioleau, as the individual owner of this vessel, with any knowledge that it was at all material on any question of enemy property."

g. The counsel for the garnishees seems still not to understand the practice in prize causes. He avers that the claim of ownership was not "a defensive allegation upon which an issue is raised" (p. 30). We have shown (brief p. 16) that, on the contrary, the allegation of ownership is the only proper allegation in a claim in a prize cause. The quotations by counsel on p. 32 of his brief, from Dunlap's Practice, do not apply to prize causes, but to instance causes, as the most cursory examination would have shown. The other authorities cited on the same page also apply only to instance causes. No authority is shown in any prize case for any defensive allegation except a claim of ownership.

h. A further misunderstanding in reference to prize proceedings is apparent in the counsel's brief, on p. 25, where he says: "The Court below condemned the *Wren* on its view of th

sufficiency of these proofs, and the Court above reversed that condemnation on its judgment of their *insufficiency*." This is the exact reverse of the fact. The question before the District Court was, whether the proofs were sufficient to sustain the claim. That Court condemned the vessel on the ground of their insufficiency; the question before the Supreme Court was the same, and this Court reversed the decree because it held that the proofs were sufficient to sustain the claim.

i. The averment of the counsel on p. 29, that "the claimant to whom restoration was to be made by peremptory order in the mandate from the Supreme Court was Edward C. Stiles," is most remarkable in view of the fact that these garnishees themselves procured the decree to be entered on the mandate directing the restoration to be made to "*John Laird, claimant.*"

III.

Turning now to the brief of Mr. Vanderpoel, associate counsel for the garnishees, we find at the outset that it is based on the idea that the amendment of the garnishees' answer was allowed.

We have already shown (ante pp. 3, 4), that that amendment to the answer was not allowed.

The reasons why it was not allowed are very manifest.

It was too late to attempt to change the pleadings, issues, and evidence when the cause came on for argument on the appeal. No suggestion of an intention to amend their answer had been made in their appeal (p. 176); no notice of motion to amend had been given, and no facts justifying such motion were shown.

The Old Dominion U. S. C. C., E. D., N. Y. MSS.

IV.

The amendment proposed was inadmissible on every ground. It furnished no matter of defence whatever to the garnishees, and the evidence offered under it furnishes none. If applied for by Laird himself, it should have been denied, because it sought to plead matter which occurred, and was known to him, two years before the entry of the original judgment.

a. The object of the proposed amendment was to allege, and of the objectionable additional evidence to prove, and the result of the findings thereon is to establish, matter which the appellees claim is good by way of bar or abatement in the principal cause against Laird.

But these garnishees can plead neither in defence, abatement, nor bar of the principal cause. The only issue they can tender the libellants is, whether at the time of the service of the process, or since, they had any property of the respondent in their possession or under their control. The issue is simply *indebitatus vel non*.

Such is the rule of the Admiralty. Clerke's Praxis is authoritive and unmistakable on that point.

See Tit. 30. Ed. 1679.

"In libello vero in hoc casu per actorem dando, non tenetur allegare aut probare debitum illius personae quam in dicto warranto praetenditur ei fuisse indebitatum, sed sufficit ad obtinendum in hac causa probare bona seu nomina dicti debitoris remanere in manibus dictae personae. Jam, hoc probata, cogenda est ad judicialiter introducendum et deponendum apud judicem bona vel debita hujusmodi et tunc actor tenetur recuperare eadem bona per defaultas, ut supra, si nullus comparuerit;

aut judicio contradictorio, si debitor praesens comparuerit et si actori quicquam debere inficiatus fuerit."

It is frankly conceded by the garnishees' counsel that they have no Admiralty authority to the contrary. (Mr. Vanderpoel's brief p. 4.)

It would seem useless, in the face of such an authority and such a concession, to search into the rule of foreign attachment under other and different systems of law. Such inquiry, however, shows the same rule everywhere prevailing, unless where specially modified by statute.

Martin J. "A garnishee has no right, as such, to plead for the defendant; he cannot oppose the plaintiff's claim against the latter. All he is to do in court is, to tell the truth, and, if his declaration be controverted, to support it, and prevent any improper decision being made as far as his own interest is concerned. If such an improper decision be made, he may certainly bring it up for our examination, but he cannot step out from the parts of the record which concern him and draw our attention to errors which affect the interests of the defendant, for these cannot be noticed by us in the absence of the latter."

Appeal dismissed.

Hanna's Syndics *vs.* Lauring. 10 Martin (La.) 568.

To the same effect are

Kimball *vs.* Plant, 14 La., 511.
Lee *vs.* Palmer, 18 La., 405.
Frazier *vs.* Wilcox, 4 Rob., 517.

In Louisiana.

Stebbins *vs.* Fitch, 1 Stewart, 180.
Cheatham *vs.* Trotter, Peck, 198.
Coleson *vs.* Blanton, 3 Hayward, 156.

In Tennessee.

Strong *vs.* Barlow, Kirby, 376.

In Connecticut.

Myatt *vs.* Lockhart, 9 Ala. (U. S.), 91.
Jones *vs.* Pope, 6 Ala., 154.
In Alabama.

Vallette *vs.* Kentucky T. Co. Bank, 2 Handy, 1–12.
In Kentucky.

Foster *vs.* Jones, 1 McCord, 116.
In South Carolina.

Ellison *vs.* Tuttle, 26 Texas, 285.
Bassett *vs.* Garthwaite, 22 Texas, 235.
In Texas.

Hefferman's Admr. *vs.* Grymes Admr., 2 Leigh, 512.
In Virginia.

Lasley *vs.* Sisloff, 7 How. (Miss), 157.
In Mississippi.

Keep *vs.* Sanderson, 12 Wisconsin, 403.
In Wisconsin.

Westoby *vs.* Day, 22 L. J., Rep., Q. B., 426.
In England.

b. Reason as well as authority dictates this rule. Plainly, were the libellants to litigate the principal cause with these garnishees, a decree in their favor at the end of that litigation would not bind the respondent, and the entire litigation might have to be repeated with him.

The object of the foreign attachment in the Admiralty is to compel the appearance of the respondent. If the garnishee, or the respondent through the garnishee, can contest the cause of action, without appearance, the object of the proceeding would be entirely frustrated.

c. The refusal to allow the amendment was right, because the evidence offered under it shows matter neither in abatement nor bar of the principal cause:

1. It does not show accord and satisfaction. The proof is directed toward a claim against the British Government, on account

of the injury alleged in the libel, and satisfaction by that government. But it shows that the ground of claim urged by the United States against Great Britain was for a breach of covenant, which rendered the injury possible, while the cause of action in the libel is for a malicious tort. Great Britain is not proved a privy to the tort; satisfaction by her, if made, was satisfaction by a stranger; and satisfaction by a stranger is no plea.

d. The proofs offered show no satisfaction. They show, if anything, a payment by the United States to these libellants of $38,958.08. The damage suffered by these libellants is settled by the decree in this cause at $143,749.16. Were England therefore a joint tort feasor with the respondent in inflicting the injury complained of, the satisfaction is but partial; and partial satisfaction is no plea.

Murray *vs.* Lovejoy, 2 Cliff., 191.

e. The payment made by England, upon the evidence, was not a payment to these libellants. It was a payment to the United States. It was not in satisfaction of any legal liability enforcible in any court. It was perhaps in discharge of a moral obligation, but as such was a payment *ex gratia*. The payment by the United States to these libellants was not made on the theory of legal obligation, or for damage ascertained in accordance with legal principles. It was a payment by the government under arbitrary rules and upon arbitrary conditions prescribed by its legislative branch, and in the nature of a gratuity in some degree measured by injury suffered.

Both the United States and England were strangers to the tort set forth in the libel.

Payment by a stranger as a gratuity is no satisfaction.

Bleakely *vs.* White, 4 Paige, 653.

f. Grant that the payment by England was in satisfaction of a judgment, and for this very injury, yet, for all that appears, as to this tort England and Laird were strangers. Judgment against and satisfaction by one is no bar to an action for the same tort against another to whom he is a stranger.

Matthews *vs.* Lawrence, 1 Denio, 212.

Atlantic Dock Co. *vs.* Mayor, etc., 53, N. Y., 64.

g. The adjustment of claims effected by the Treaty of Washington was of all claims of citizens of the United States upon the Government of Great Britain, and of all claims of English citizens upon the Government of the United States, only. It was not in terms and could not by implication be deemed an adjustment of claims of citizens of either country upon those of the other, and it was so held in a far stronger case than the present, under the Treaty of 1789.

Admr. of Whitaker *vs.* English, 1 Bay (S. C.), 15.

In order to give the Treaty the effect claimed for it by the garnishees, it would be necessary to write into it in Articles XI. and XVII. a provision which would equally operate as a bar to every action between an Englishman and American for any cause accruing between April, 1861, and June, 1865.

V.

In reference to all the suggestions in the briefs of both counsel for the garnishees as to the effect of the alleged amendment to the answer and the proofs under it there is one conclusive answer, namely:

The judgment in favor of these libellants against John Laird entered on the 19th September, 1873 (tol. 171).

a. The libellants brought suit against John Laird. They attached, as they claim, property of John Laird.

b. If the libellants *did* attach property of John Laird, the District Court had jurisdiction to enter judgment in their favor against him.

c. The District Court having decided that the attachment had reached property of John Laird, entered judgment against him on the cause of action set up in the libel for the sum of $143,749.16.

d. The garnishees contest the question whether property of John Laird was attached. If that question was rightly decided against them by the District Court, they could not, after the entry of the judgment against Laird, set up a defence to the original cause of action, for, as to that cause of action, the judgment was and is conclusive proof.

e. That judgment against John Laird still remains in full force and vigor. The decree of the Circuit Court carefully refrained from affecting it in any way except so far as it might be affected, by the decision that no property

of Laird's had been attached, *i.e.*, that the District Court had no jurisdiction of the cause. If this Court shall come to the conclusion that the decision of the Circuit Court that no property of Laird's had been attached was erroneous, and that the decision of the District Court that property of Laird's had been attached was correct, from that moment the question of jurisdiction being disposed of, the judgment of the District Court that these libellants are entitled to recover of Laird the sum decreed becomes unassailable. Certainly unassailable by any averment of occurrences previous to the entry of the judgment.

In other words, by the alleged amendment the garnishees seek to show that the libellants were not entitled to judgment against Laird.

The answer is that the judgment has been recovered, has not been appealed from, still remains of record and unsatisfied, cannot be attacked by any one in any proceeding, except one brought especially to set it aside, and is conclusive evidence of the right of the libellants to recover against Laird.

VI.

To the suggestion that in case of payment by the garnishees under the decree in this cause, they would be without defence to a suit by Prioleau for the *Wren* proceeds, we answer:

a. That the decree in this cause is a complete defence to such an action.

Embree *vs.* Hanna, 5 Johns., 101.
Holmes *vs.* Remsen, 20 Johns., 229.
McDaniel *vs.* Hughes, 3 East., 367–79.

In the last case Lord Ellenborough said: "So that it appears that the proceedings have been strictly regular according to the custom; and it can be only on the ground of the court's *seeing* that those proceedings are void (and these certainly are not so upon the face of them) that the judgment of the Court below fails of being a bar to an action for the recovery of the same sum in another court. If the proceedings are not void, the jury then having found a verdict contrary to the fact as stated in the case, in finding that the garnishees owed the money at the time of the attachment, such statement cannot thereby deprive the garnishee of this defence; for if it could he would be liable to pay over again that money, which, after the judgment against him in the Mayor's Court, he had no means of retaining in his hands."

VII.

The proceeds of the *Wren* were not in the hands of any officer of the government *as such*, within the reasoning of the cases cited by Mr. Vanderpoel. They were not government money.

They were on deposit with the Sub-Treasurer, and held by him subject to the order of the Florida Court as bankers always hold deposits. In legal intendment they were in the possession of that Court as much as if on deposit in a bank. Private property in the custody of a government officer may always be reached by attachment.

The proposition that moneys in the registry of the Court cannot be arrested by attachment is most astonishing after the remarks of the Court in

The *Louisetta*, 2 Gall., 307.

What stronger "caution" could be filed in the Florida Court than a libel with the Court's own allocatur of process by a formal order?

The attachment of funds in the registry of the Court is a matter of familiar practice in the admiralty.

J. LANGDON WARD,
Proctor for Appellants.

ROBERT D. BENEDICT,
Advocate.

U. S. Supreme Court.

No. 197.

JOHN N. CUSHING ET ALS.
Appellants,

vs.

JOHN LAIRD, THE YOUNGER,
FOSTER & THOMSON,
Garnishees and Appellees.

No. 388

JOHN N. CUSHING ET ALS.
Appellees,

vs.

JOHN LAIRD, THE YOUNGER,
FOSTER & THOMSON,
Garnishees and Appellants.

Brief and Points in Behalf of Garnishees.

FOSTER & THOMSON,
In pro per.

C. VAN SANTVOORD,
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1881.

U. S. Supreme Court.

JOHN N. CUSHING ET ALS., *Appellants*, *v.* JOHN LAIRD, THE YOUNGER, FOSTER & THOMSON, *Garnishees and Appellees.*	*No.* 197.
JOHN N. CUSHING ET ALS., *Appellees*, *v.* JOHN LAIRD, THE YOUNGER, FOSTER & THOMSON, *Garnishees and Appellants.*	*No.* 388.

The appeal to this court of John N. Cushing *et al's.*, in the record, in No. 197, is from so much of the decree of the Circuit Court of the United States for the Southern District of New York, of the 12th day of October, 1873, as is specified in the petition of appeal; being so much of the decree as retained the cause on the appeal of the garnishees to the Circuit Court from the decree of the District Court, bearing date and entered the 19th day of September, 1873 and ordered and ad-

judged and decreed that the fund known as the proceeds of the steamer *Wren*, in the hands of Foster & Thomson, when served with process in this action, was not the property of John Laird, Jr., the defendant in the principal suit, and that it cannot be subjected to the payment of the decree against him.

And which further ordered, adjudged, and decreed, as thereinafter contained in said decree to the end.

The decree of the Circuit Court and appeal of the libellants is found on pages 257 to 262 in the Record in 197.

The appeal of the garnishees to this court, in the record No. 388, is from so much of the same decree of the Circuit Court as dismisses their appeal to the Circuit Court from the decree of the District Court, of April 26, 1873, and the order of same date, upon the footing of said last mentioned decree adverse to the garnishees.

This appeal is found on pages 8 to 12 in Record in No. 388.

(1.) The libellants, appealing from so much of the decree of the Circuit Court as retained the cause on and adjudged and decreed as above, as on the hearing of the cause on the garnishees appeal from the decree of the District Court of the 19th September, 1873 (which, in the order of time, was the second appeal of the garnishees from the District to the Circuit Court), the garnishees have appealed to this court from the dismissal of their appeal from the decree of the District Court of 26th April, 1873 (the first below in the order of time), from the same motive of caution which induced a first and second appeal below.

In the record in 197, the first appeal is omitted ; it is contained in the record in No. 388, on pages 2 to 6.

The cause was heard below on each appeal on the same pleadings, proofs, rulings and proceedings. Reserving the question until the final decision, whether the decree of the District Court of 26th April, 1873, and the order of that date might be held a final decree, in the sense of the Act of 24th September, 1789, sec. 22, and the Act of 3d March, 1803, sec. 2, from

which an appeal should or might be taken; and the decree of 19th September, 1873, as between the libellants and garnishees, as a supplemental decree based upon and in execution of the former and appealable from as a supplemental decree (as to which see Ray *v.* Law, 3 Cranch., 179, as explained, 10 Whea., 504; Whiting *v.* Bank of the United States, 13 Peters, 15; Forgay *v.* Conrad, 6 How., 201, 202, 203; Carr *v.* Hoxie, 13 Peters, 460; Forgay *v.* Conrad, 6 How., 206), or whether the decree of 19th September, 1873, was the only final decree from which to appeal.

It being adjudged by this court in conformity to the decree of the Circuit Court, that the decree of 19th September, 1873, was the final decree from which to appeal. The appeal of the garnishees is not important, except as a matter of costs.

If otherwise, the garnishees, it is submitted, should be adjudged entitled to the same relief on the appeal from the decree and order of 26th April, 1873, and as on the hearing on such appeal, as is adjudged in the Circuit Court on the appeal from the decree of 19th September, 1873.

(2.) Three libels were filed in the District Court of the United States for the Southern District of New York.

The first, on September 16, 1868, in the name of John N. Cushing and William Cushing, both of Newburyport, in the Commonwealth of Massachusetts, as libellants, against John Laird, the younger, of Birkenhead, in the kingdom of England, shipbuilder, in a cause of spoliation and damage, civil and maritime, alleges,

First.—That at and before the time of the several trespasses thereinafter mentioned, the said libellants were the true and lawful owners of the ship *Sonora*, a duly registered American ship.

Second.—That theretofore and on or about the 26th day of December, 1863, the said ship was on a lawful voyage from Hong Kong, in China, bound to Akyab, in British India, under charter to C. F. Webert & Co., of London, England, to load at Akyab, aforesaid, with merchandise for Europe.

Third.—That on the day and year aforesaid, to wit.: the 26th day of December, 1863, the said ship, then being on the high seas, and within the flux and reflux thereof, and engaged in the peaceable prosecution of a lawful voyage, as aforesaid, in latitude 3 deg. north, and longitude 101° east, or thereabouts, in the straits of Malacca, was overtaken by a certain armed vessel called the *Alabama*, theretofore by the said John Laird, the younger, wrongfully and in direct violation of the laws of the kingdom of Great Britain, built, fitted out and equipped, for the purpose of preying upon and piratically destroying vessels and property of citizens of the United States, and at that time, as these libellants are informed and believe, purporting to be commanded by one Raphael Semmes.

Fourth.—That by reason of the said acts of plunderage and violence committed by the said armed piratical cruiser, called the *Alabama*, built, fitted out and equipped by the said John Laird, the younger, of Birkenhead, England, shipbuilder, in violation of law and with the intent and purpose that she should be engaged in acts of piracy, plunder and destruction on the high seas, to the wrong, prejudice and damage of peaceful men engaged in lawfully navigating the same with their ships, and merchandise, as aforesaid, these libellants have sustained damages as follows, that is to say:

For the value of said ship, $85,800, and for the value of the charter of said ship, $33,244, in all, $119,044.

Whereupon the libellants pray, &c.

The second libel (amended) was filed on 29th September, 1868, in the name of John N. Cushing and William Cushing, both of Newburyport, in the Commonwealth of Massachusetts, merchants, as libellants, against John Laird, the younger, of Birkenhead, in the kingdom of England, shipbuilder, in a cause of spoliation and damage, civil and maritime, and alleges:

First.—That at and before the time of the several trespasses thereinafter mentioned, the said libellants were the true and lawful owners of twenty-two thirty-seconds (22-32) of the ship *Sonora*, a duly registered American ship.

The other articles are the same as in the first libel, except

that the damage claimed is for the value of the share of the libellants in said ship, and proportionate share of the charter, aggregating, as stated, $81,842.75.

The grounds stated for charging Laird are the same, to wit, a breach of the English neutrality laws, in building, fitting out and equipping the *Alabama*.

The third libel (amended) was filed 17th May, 1869, in the name of John N. Cushing and William Cushing, of the City of Newburyport, in Commonwealth of Massachusetts, merchants, in their own right, and as executors of the last will and testament of Nicholas Johnson, deceased; Mary A. Johnson, executrix of the last will and testament of Henry Johnson, deceased; Keturah M. Pritchard, administratrix of the goods, chattels and credits of Thomas Pritchard, the younger, deceased, and Elizabeth H. Pritchard, executrix of the last will and testament of William Pritchard, deceased, all of the said City of Newburyport, Massachusetts, gentlewomen, as libellants against John Laird, the younger, of Birkenhead, in the kingdom of England, shipbuilder, in a cause of spoliation and damage, alleging:

First.—That at and before the time of the several trespasses thereinafter mentioned, the said libellants, their respective testators and intestate, now deceased, were the true and lawful owners of the ship *Sonora*, a duly registered American ship.

The other articles are the same as in the first libel, except that the alleged value of the ship and charter lost is less, as stated.

The alleged ground of claim against Laird is the same.

(3.) Pursuant to the prayer, a citation was issued on the first libel, with a clause of foreign attachments against credits and effects of Laird in the hands of Foster & Thomson and the assistant treasurer, as garnishees, tested 16th September, 1868, returnable 22d September (on pp. 3, 4).

Like process on the second libel, tested 29th September, 1868, returnable 3d November, 1868 (on p. 9).

Like process on the third libel, tested 17th May, 1869, returnable 15th June (on p. 15).

Amended returns were filed by the marshal to the process on each libel on April 12, 1870 (pp. 4, 10, 16).

From the prayer in the libel (on p. 2), that if he (Laird) can not be found, that his goods and chattels, and if none be found, that his credits and effects in the hands of Foster & Thomson, and in the hands of the Assistant Treasurer of the United States (known as the proceeds of the steamship *Wren*, or otherwise), garnishees, may be attached to the amount sued for, and costs, it appears that what was sought by the libels was to attach the proceeds of the *Wren* in the hands of the garnishees as the property of Laird.

On 12th April, 1870, the day of filing the amended return of the marshal to process issued to him on the libels, Foster & Thomson, cited as garnishees, filed their answer in the District Court, in which, in the second article thereof, they say: But these respondents appearing, and protesting to the jurisdiction of the court, do answer and say, that it is not true that they held, at the time of the service of the several processes in this action, nor at any time since, any goods, chattels, choses in action, property, credits, or effects in their hands, or under their control, belonging to the said John Laird, the younger, or in which he has any interest (pp. 20, 21).

Interrogatories were propounded to the garnishees on behalf of the libellants (on p. 25).

The garnishees, Foster & Thomson, answered as in the record (on pp. 30 to 34).

By their answers it was shown that they did not know Laird, had never seen him, or had any personal acquaintance or business relations with him, had never corresponded with him or done business for him of any kind, had no personal knowledge of his residence or occupation, but believed that he carried on business as a shipbuilder at Birkenhead, England, and has done so for several years last past.

That under the circumstances thereinafter stated, a power of attorney, of which a copy was annexed, dated the 2d day of July, 1868, and purporting to be executed by John Laird, the younger, and Edward Copeland Stiles, was received by their

firm from one Charles K. Prioleau, of Liverpool, England. The said power was not sent or delivered to them by Laird or Stiles, nor did they receive any directions, in reference to the matters therein contained, from them, or either of them.

That prior to the 3d day of January, 1865, John Laird, the younger, was, as they believed, the owner of the steamer *Wren*. On that day he sold said steamer to Charles Kuhn Prioleau, of Liverpool, England, for £15,450, which was then paid to him therefor by said Prioleau, and on that day he duly executed and delivered to said Prioleau a bill of sale for the same, which bill of sale they had in their possession ready to be produced before the Honorable Court, and thereupon and thereafter the said Laird had no ownership of or interest in said steamer.

That said bill of sale was duly entered and registered in the Custom House at Liverpool on the 1st of May, 1865, the certificate of which entry and registry they had in their possession ready to be produced; that said entry and registry in the Liverpool Custom House was too late for entry on the registry on board of the steamer, which was then on a voyage.

That upon the return voyage of said steamer she was seized by certain persons who had shipped upon her, viz.: on the 13th day of June, 1865, and taken into Key West, and there was libelled and condemned as prize of war in the District Court of Florida.

That after such condemnation the said Charles K. Prioleau, the owner of said steamer and cargo, employed their firm to attend to the appeal from such decree of condemnation to the Supreme Court of the United States, such appeal being conducted in the name of Edward Copeland Stiles, who was the master of said steamer when she was captured, and who filed the claim in the District Court, and upon argument of said cause on appeal the decree of condemnation was reversed, and restitution of the vessel and cargo was ordered to the said claimant, Stiles, as by a copy of said decree thereunto annexed will more fully and at large appear; that for the purpose of drawing the proceeds of said steamer and cargo for said Charles K. Prioleau, the owner thereof, deponent's firm deemed it the more convenient course that said Prioleau should obtain and forward to them a power of attorney for the claimant, Stiles, and for greater caution, and for no other reason, they suggested to said Prioleau that as the name of the said Laird appeared on the

register on board the steamer as the nominal owner, he should also execute such power, so that if any authority from him was required it should be in possession of deponent.

That Prioleau forwarded to them said power of attorney * * held by us for the benefit of said Prioleau, the owner of said steamer.

That their firm had no communication with Laird or Stiles, or either of them, but collected and received the proceeds of said steamer under and by virtue of the directions received by them from said Prioleau, and not otherwise.

To the fourth interrogatory—That their firm received, as the proceeds of the steamer *Wren*, on 19th May, 1869, the sum of $29,869.62, and on the 29th of May, 1869, the sum of $1,572.

These sums were received by this firm under the decree of the Supreme Court of the United States, directing restitution to be made to the claimant, Edward Copeland Stiles, and they were collected for the benefit of Charles Kuhn Prioleau, the owner of said steamer. * *

Of said two amounts, $2,000 has been paid subsequently to the 19th day of May, 1869, to counsel for argument of the appeal in the Supreme Court of the United States, and $1,171 was paid on or before that date for law expenses in Florida. The residue is in our possession, to the credit of Charles K. Prioleau, and held by us as his property, subject to our charges for professional services.

Fifth Interrogatory.—State whether or not, on or about the 18th day of May, A. D. 1869, you, or either of you, received a check drawn by Thomas J. Boynton, Judge of the District Court of the United States for the Southern District of Florida, dated May 10, 1869, for $29,869.62, and whether or not the said check, or the proceeds thereof, is now in your possession or under your control, and if not, when you parted with the same, and to whom, and how and why; and state further, whether or not the said check, or any part of the amount represented thereby, was a part or the whole of the proceeds of the steamer *Wren* and her cargo, or of either of them; and whether or not the same or any part thereof was a part or the whole of a certain fund, known as the proceeds of the steamer *Wren*, at and

before the 20th day of February, A. D. 1869, in the Registry of the District Court of the United States for the Southern District of Florida; and whether or not the said check was received by you, or either of you, or any one in your behalf, or on behalf of the said John Laird, the younger, under or by virtue of or by means of the power or letter of attorney hereinbefore referred to, and if not, how otherwise?

The answer to this interrogatory: His firm did receive such check, and the proceeds thereof, with the exceptions above stated, are in our possession, subject to our professional charges. The said check was a part of the proceeds of the steamer *Wren* and her cargo, and the same was a part of the fund known as the proceeds of the steamer *Wren*, at and before the 20th day of February, 1869, in the Registry of the District Court of the United States for the Southern District of Florida. The said check was not received by us on behalf of the said John Laird, the younger, under or by virtue of or by means of the power or letter of attorney hereinbefore referred to, but the same was received by us as the property and on account of Charles K. Prioleau, under the power and authority forwarded to our firm by said Prioleau from the claimant, Edward Copeland Stiles, any authority from said Laird being unnecessary and not required, restitution having been ordered to be made by the Supreme Court of the United States to the said Edward Copeland Stiles.

A copy of the power, dated 2d July, 1868, and executed by John Laird, Jr., and Edward C. Stiles, is annexed to the answers (on pp. 32, 33).

Also a copy of the mandate from this court to the Judges of the District Court of the United States for the Southern District of Florida, in a cause between the United States, libellants, and the steamer *Wren* and cargo, E. C. Stiles, claimant, tested 1st Monday December, 1867 (23 March) (on pp. 33, 34).

(5.) After libellants exceptions to answers of the garnishees to the interrogatories were overruled, the cause came on for trial in the District Court, November 6, 1872, between the

libellants and the garnishees on the issue raised by the answer of the latter. Both sides saying the issue was whether, when process of garnishment was served on Foster & Thomson, the proceeds of the *Wren* belonged to Laird. (See minutes of the trial, pp. 39 to 45.)

The copy transcript of the papers on the appeal to the Supreme Court of the United States, in the steamship *Wren* and cargo, Edward C. Stiles, master and claimant, appellant *vs.* The United States, including briefs of counsel for the arguments offered in evidence by the libellants' counsel (found pp. 46 to 135). Record of proceedings, to sell the *Wren*, in the District Court of Florida, in the Prize Case of the United States *vs.* The Steamer *Wren*, the mandate from the Supreme Court, and proceedings thereon (from pp. 135 to 142). Proceedings in suit of John N. Cushing and others *vs.* Laird, in District Court of Florida, (142 to 153.)

Correspondence between Foster & Thomson and J. Langdon Ward (153 to 154).

Ex. No. 1. Bill of sale of the *Wren* to Prioleau by John Laird, Jr., dated 3d January, 1865; entered at the Custom House at Liverpool, 1st May, 1865 (pp. 154, 156).

Ex. No. 2. Certificate of registry of the *Wren*, and entries thereon (156 to 160).

Correspondence of Foster & Thomson with Dockray (160 to 168).

The opinion of the District Judge is found 6 Benedict, R. 408.

The decree of the District Judge of 26th April, A. D. 1873, and the order of that date made thereupon, are set forth in the record in 197 (on pp. 168, 169), as follows:

At a stated term of the District Court of the United States for the Southern District of New York, holden at the United States Court Rooms, at No. 41 Chambers street, in the City of New York, on Saturday the twenty-sixth day of April, A. D. 1873.

Present—Hon. SAMUEL BLATCHFORD, *District Judge.*

JOHN N. CUSHING ET AL.
v.
JOHN LAIRD, THE YOUNGER.

The issue raised by Foster & Thomson, the garnishees in this suit, denying the possession at the time of service of the several processes in this action, or at any time since, of any goods, chattels, choses in action, property, credits or effects belonging to John Laird, the younger, the respondent herein, coming on to be heard, and both parties having adduced such proofs in that behalf as they were advised, and the advocates of the respective parties having been heard, and due deliberation having been had thereupon, now, on motion of J. Langdon Ward, proctor for the libellants, it is

Ordered, adjudged and decreed, that the said Foster & Thomson, the garnishees in this suit, did have in their hands at the time of the levy of the attachments herein, credits and effects of the said John Laird, the younger, respondent herein, to wit: the proceeds of the steamer *Wren*, amounting to the snm of thirty-one thousand four hundred and forty-one dollars and sixty-two cents.

SAMUEL BLATCHFORD.

At a stated term of the District Court of the United States for the Southern District of New York, holden at the United States Court Rooms, No. 41 Chambers street, in the City of New York, on Saturday, the 26th day of April, A. D. 1873.

Present—Hon. SAMUEL BLACHFORD, *District Judge.*

JOHN N. CUSHING ET AL.
vs.
JOHN LAIRD, THE YOUNGER.

Upon all the the papers, pleadings and proceedings in this suit, and on motion of J. Langdon Ward, proctor for the libellants, it is

Ordered, that Foster & Thomson, the garnishees, do forthwith pay into this court the sum of thirty-one thousand four hundred and forty-one dollars and sixty-two cents, the amount of moneys decided to be in their hands belonging to the respondent in this suit, or give stipulation, with sufficient surety, according to the course and practice of this court in admiralty causes, to abide the further order or decree of this court in relation thereto.

SAMUEL BLATCHFORD.

Pursuant to this order made upon the foregoing decision of same date, Foster & Thomson, the garnishees, gave a stipulation with Gamaliel G. Smith and A. A. Thomson, as sureties, taken and acknowledged before a U. S. Commissioner, May 5, 1873, set forth in the Record in No. 388 on pages 1 and 2.

And they appealed from the foregoing decree and order of the 26th April, A. D. 1873, to the Circuit Court, as per their notice and petition of appeal dated May 6, 1873, set forth in the Record in No. 388.

The appeal papers from the decree and order of 26th April, 1873, to the Circuit Court, are found on pages 2 to 6 in the Record in No. 388.

The stipulation aforesaid, and appeal papers from the decree and order of 26th April, 1873, should have been inserted by the clerk in the return, in No. 197, to complete the record, as will appear by reference to the decree in the Circuit Court, in the Record, in No. 197 (at p. 257, etc.).

Reference is made for the appeal papers on the appeal taken by the garnishees from the decree and order of 26th April, 1873, to the Circuit Court, on pages 2 to 6 in Record in No. 388 and on their appeal to this court to the Record in No. 388, on pages 8 to 15.

After the assessment, under the order bearing date 29th April, 1873, the District Judge made the decree of 19th September, 1873, as contained in the Record, in No. 197 (on pp. 169–177).

Read this—

The notice and appeal therefrom to the Circuit Court by the garnishees (called the 2d appeal) is in the Record in 197 (pp. 172–176).

(6.) The findings of fact and conclusions of law of the Judge in the Circuit Court are set forth in the Record, pp. 192 to 206. His Opinion, 207 to 215:

> The findings of facts and conclusions of law are printed in what is called a bill of exceptions, which may stand as a statement of proceedings, so far as relevant and admissible.
>
> Under the act of February 16, 1875, relating to appeals in admiralty, and the decision thereon (*The Abbotsford*, 8 Otto, 440; *The Benefactor*, 12 Otto, 218, and other cases) the proposed findings of fact and conclusions of law on the part of the libellants (on pp. 183 to 192), as a ground for exception, and the further requests and exceptions in the Record, on pp. 215 to 221, are unauthorized, and should be struck out.

(7.) Under amended answers of the garnishees, as allowed in the Circuit Court (from foot of p. 181 to end of third sentence on p. 183 in Record in No. 197; on pages 6 and 7 in Record in No. 388), the judge found the following facts (on pp. 205, 206):

32. At the time of the commencement of this action all the libellants were citizens of the State of Massachusetts, and Laird was a subject of Great Britain, resident at Birkenhead, England.

33. On the 19th November, 1864, the libellants, or those whom they represent, caused their memorial and protest to be filed in the office of the Secretary of State of the United States, in which they asked the intervention of the United States to obtain reparation from the Government of Great Britain for the same identical cause of action set forth in the libel in this suit. Their claim as filed was as follows:

Loss of vessel above insurance	$25,800 00
Loss of charter	33,244 44
Insurance of vessel	30,000 00

34. The claim thus filed was included among those presented by the agents of the United States to the Tribunal of Arbitration, at Geneva, under the provisions of the treaty between the United States and Great Britain, concluded May 8, 1871, known as the Treaty of Washington.

35. In or about the month of December, 1874, after the establishment by Congress of the Court of Alabama Claims, these libellants, or their legal representatives, presented to that tribunal their petition, in which they demanded judgment against the United States for $134,893.34, including value of ship ($115,869.50; less insurance, $30,000), $85,869.50; net freight, $44,094 33, and stores, $4,929.51, and afterwards such proceedings were had upon this petition that judgment was rendered against the United States for

Damages	$33,334 30
Interest	15,286 02
In all	$48,620 32

which was paid in full October 19, 1877.

(See passage in the opinion in the 3d, 4th and 5th paragraphs, on p. 214, as to this branch of the case.)

Upon these findings of fact bringing the cause of action alleged in the libel within the submission and operation of the Treaty of Washington, and by which it was discharged, we

shall submit to the court that under its obligation to give effect to the provisions of that treaty, the court should discharge the attachments against the garnishees, if otherwise sustainable, and dismiss them from the proceedings in the cause.

II.—Assignment of Error.

The garnishees assign for error, on their appeal in 388, that the court should not have dismissed their said appeal from the decree of the District Court and the order made thereon of 26th April, 1873, but should have retained the cause on both of their appeals to the Circuit Court, as well on their said appeal from the decree and order of the District Court of 26th April, 1873, as on their appeal from the decree of the District Court of the 19th September, 1873.

III.—Points of Argument.

First.—As it is found by the judge in the Circuit Court:

(1.) The steamer *Wren* was built at Birkenhead, England, in the year 1864, by Laird Bros., and registered at Liverpool England, in the name of John Laird, Jr., as owner. A certificate of this registry was issued in due form, and the vessel sailed from Liverpool, having the certificate on board as part of her ship papers.

(2.) On the 3d of January, 1865, after the vessel had left Liverpool, John Laird, Jr., executed and delivered a bill of sale, in due form of law, whereby he conveyed her, with her tackle, &c., to Charles Kuhn Prioleau, of Liverpool, a member of the firm of Fraser, Trenholm & Co., for the consideration of £15,450, and on the first day of May, 1865, this bill of sale was duly

entered at the Custom House in Liverpool, and the vessel registered in the name of Prioleau as owner.

30. It does not appear from the evidence that the *Wren* ever entered a British port after leaving Liverpool, December, 1864, and previous to her capture.

(31.) It does not appear from the evidence that Laird exercised any act of ownership over the *Wren* after the execution of the bill of sale, and she was actually employed, nearly or quite all the time, before her seizure, in running between Havana and Galveston, breaking the blockade at Galveston.

(3.) On the 13th June, 1865, while on a voyage from Havana to Liverpool, by the way of Halifax, Nova Scotia, a portion of the crew took forcible possession of the vessel, overcame her officers, and ran her into Key West, where they delivered her to the naval authorities of the United States.

(4.) On the 16th of the same month, of June, the Attorney of the United States for the Southern District of Florida filed in the District Court for that district a libel of information against the steamer as prize of war, in the words and figures as set forth in the findings; in which it is alleged as a ground for the condemnation and forfeiture of the *Wren;* her capture on the high seas as a prize of war, that she had been brought into the port and harbor of Key West, in the State of Flordia, where she now is, within the jurisdiction of the court, and that she is lawful prize of war.

(6.) On the 26th of June, Edward C. Stiles, master of the vessel, appeared in court and filed a claim to the vessel, in the words and figures as set forth in the findings:

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} *Prize.*

And now comes Edward C. Stiles and says that he is master of the said steamer *Wren*, and as such is the lawful bailee of said steamer, her tackle, apparel and furniture, and claims the same for the owner thereof.

And he further says, that John Laird, a lawful British subject, residing in England, is the true and *bona fide* owner of said steamer, and that no other person is the owner thereof, as appears by the register of said steamer now in the posession of the court, and as he is informed and believes.

And he further says, that the said steamer had no cargo when seized.

And he further says, that he denies that said steamer is a prize of war.

And he prays restitution, &c.

On the 27th of June, the court proceeded to hear the cause upon the allegations and pleadings, the depositions taken *in preparatorio*, and the papers, letters and writings found on board the vessel. On the 29th of June, the court, upon its own motion, directed the Prize Commissioner to take, immediately, the testimony of the master, purser and first mate of the vessel, and of any other witnesses that might be produced by the claimant from the persons on board the vessel, upon certain specific interrogatories; of Charles W. Gilley and John Howard, and any other witnesses produced by the captors from persons on board, upon the first two of the interrogatories to be propounded to the witnesses produced from those on board by the claimant; and of any witnesses produced, either by the Government or the claimant, from persons not on board, upon certain other interrogatories. Two days were allowed the parties to produce the witnesses.

(8.) On the 8th July, the court announced its opinion in this (the) case, and condemnation of vessel and cargo, but exceptions

having been taken to certain rulings, the decree in form was delayed until August 15, when it was duly entered in the words and figures set forth in the findings.

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A claim having been interposed for the vessel and cargo by Edward C. Stiles, master of said vessel, for and on account of John Laird, the younger, a British subject, and this cause having been heard on the libel and proofs and testimony taken *in preparatorio* and pleadings of the claimant, and all due proceedings having been had, and the court being fully advised in the premises, and it appearing to the court that the said steamer *Wren*, her tackle, apparel, furniture and cargo were at the time of capture the property of enemies of the United States, it is now ordered, adjudged and decreed, that the said steamer *Wren*, her tackle, apparel, furniture and cargo be condemned and forfeited to the United States as lawful prize of war.

Then follows an order for the sale of the *Wren*, and for a deposit of the proceeds with the Assistant Treasurer of the United States, subject to the order of this court as required by law.

(9.) From this decree an appeal by the claimant to the Supreme Court was in due form allowed, and the required security given, August 25.

(11.) Foster & Thomson, the garnishees, employed by Prioleau, still residing in England, procured a copy of the record in the District Court, and had the appeal docketed in the Supreme Court, February 7, 1866.

(13.) And such proceedings were thereupon had that at the December term, 1867, of the Supreme Court, the decree of the District Court was reversed, and an order was entered to the

effect that the cause be remanded, with direction to restore the vessel and her cargo to the claimant without costs.

The Mandate filed in D. C. of Florida, 13th April, 1869, foot p. 135–136, referred to in findings on pp. 200, 203.

Second.—That by the bill of sale to Prioleau, and the registry thereof in conformity to the requirement of English law, sec. 57 of Merchants' Shipping Act, 17 and 18 Victoria, ch. 104, the title was vested absolutely in him, of date 1st May, 1865, was not controverted nor controvertible.

That the change of title was not noted on the certificate of registry on board, is sufficiently accounted for by the fact that the *Wren* had left Liverpool in December, 1864, and was absent on voyages from Havana to Galveston, and had not returned to her home port, no one being authorized to endorse a change of title on this certificate except the registrar, and there being no requirement to produce the certificate for such endorsement until the return of the ship to the home port (sec. 45 of Merchants' Shipping Act), and so no ground for the imputation of any culpability in this which could affect the title. That the master in charge did not know of the change was a mere accident, arising from his being placed in command at Havana, and inferring, from the certificate of registry on board, when his attention was called to it, and he was required to state his belief as to who the owner was, that Laird was the owner.

The counsel for the libellants, ignoring the common learning that, by the law of prize, the property of a vessel is not changed by a capture, nor without sentence of condemnation by a competent court; and that the reversal of a decree of condemnation, which is an acquittal, leaves the property, that is, the private right of property, where it was before the seizure, contended that the reversal by the Supreme Court of the decree of condemnation of the *Wren* by the District Court of Florida, and the award of restitution to the claimant in the mandate of the Supreme Court, issued 23d March, 1868, was an adjudication that the real or private right of property in the *Wren* was

in Laird, whereby Prioleau and the garnishees as his agents were estopped from asserting his title.

In this contention they referred to passages in the depositions and evidence in the prize suit, to arguments of counsel on the hearing in the Supreme Court, and to passages arguendo in the opinion in the Supreme Court.

For the purpose of determining the effect or purport of the decree of reversal this is not permissible. In Fitzsimmons *v.* The Newport Ins. Co., 4 Cranch, 185–192, at 192 Rawle offered to read the depositions and evidence contained in the proceedings of the Vice-Admiralty in a prize case, which were referred to by the special verdict, and of which a copy thereto was annexed.

But the court stopped him, saying that the proceedings in the Vice-Admiralty were only matter of evidence to the jury, into which this court could not look.

That briefs of counsel and arguments in opinion of the court are not admissible for such purpose, we cite the following cases:

Williams *v.* Norris, 12 Whea., 117, 118 to 120.
Rector *v.* Ashley, 6 Wall, 148.
Gibson *v.* Choteau, 8 Wall., 317.
Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 613, 614.
Fisher *v.* Ogle, 1 Camp., 418.
Cristie *v.* Secretan, 8 T. R., 192, 196.

Looking at the record, the only question was of prize or no prize. In the District Court the *Wren* was condemned, "it appearing to the court that the said steamer *Wren*, her tackle, apparel and furniture were at the time of capture, the property of enemies of the United States."

The reversal by the Supreme Court and order of restoration to the claimant relieved the *Wren* from the burden of the condemnation by the District Court, and the only fact of which, as an adjudication, it is evidence, is the negation of any ground for condemnation of the *Wren* as enemy property or as prize of war.

Third.—The supposition that the decree of reversal, whereby the *Wren* and proceeds were released from the burden of the condemnation in the District Court as a prize of war, and its consequences, had any effect whatever as an adjudication that the private right of property, at the time of the capture or thereafter, was in John Laird, is founded upon a misconception of and is without authority in the law of prize.

(1.) It is settled by authority that the sentence of a prize court of the country of the captors, upon proceedings regularly instituted and prosecuted, condemning a vessel as prize of war as being enemy property, or for breach of blockade, or other offense against the rights of war, is not only conclusive of the right which it establishes—that is, of the change of property produced by the sentence of condemnation—but of the fact upon which the sentence of condemnation proceeds, or, as it is sometimes expressed, of the fact it directly decides.

That is to say, if a vessel is condemned by a prize court as being enemy property, this sentence conclusively establishes against all the world that the property of whoever were the owners at the time of the capture, has been thereby divested and transferred to the captors, or the government on whose behalf the proceedings were instituted, and also of the fact that the vessel was enemy property as between the belligerents, or according to the rights of war, if that is the ground on which the decree of condemnation professes to proceed, or if the condemnation professes to proceed upon the fact of breach of blockade, it establishes that fact so conclusively against all the world that it cannot, as a rule, be drawn into question or controverted, directly or collaterally, in any other court.

The reason given is, that prize courts have exclusive jurisdiction of questions of prize or no prize, and the further reason that all the world are parties, not for every purpose, but to show cause against the ground alleged for condemnation, as well as against the condemnation itself.

See form of *citation* p. 47.

The cases cited by the District Judge are:

1. Croudson *v.* Leonard, 4 Cranch, 434.
2. *The Mary*, 9 Cranch, 126.
3. Bradstreet *v.* Neptune Insurance Co., 3 Sumner, 600.

These cases, reference being had to the subject matter, relate only to the conclusiveness of sentences of condemnation by prize courts of the right of property acquired by the sentence, and of the ground or the direct fact upon which such sentence professes to proceed.

What these cases—and there are many others teaching the same doctrine—decide is, that the title or property of which a sentence of condemnation by a prize court is evidence is that acquired by the sentence, and the facts of which it is evidence are those on which such sentence professes to be founded, the direct facts in issue under the pleadings, whether enemy property as between belligerents, or according to the rights of war or not, whether a blockade was broken or whatever other offense was committed as the ground of condemnation, determined according to the summary and peculiar method of proceedings in prize courts, whose aim, according to the preface to Marriott's Admiralty Reports, "ought to be as summary as possible, and as the style is, *velo levato* (with full sail hoisted), without being changed to the resemblance of the long-tailed and encumbered proceedings of a court of chancery."

Croudson *v.* Leonard, 4 Cranch, 434, was an action on a policy of insurance in which the defense was that the policy was forfeited by committing a breach of blockade, and the question was upon the conclusiveness of a sentence by a British prize court in Barbadoes, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade to establish the fact of the commission of this offense. The court held it was conclusive.

The Mary, 9 Cranch, 126. In this case this vessel and cargo was captured by the privateer *Paul Jones* on the high seas,

on the 23d of April, 1813, and sent into Newport, where she was libelled by the captors as being and bearing enemy property, and also by the United States for a breach of the non-intercourse acts.

To sustain the claim of the claimant of the cargo from exemption from capture under the President's instructions of the 28th August, 1812, which directed "the public and private armed vessels of the United States not to intercept any vessels belonging to citizens of the United States coming from British ports to the United States laden with British merchandise, in consequence of the alleged repeal of the British orders in council," it was material that it should appear that the vessel belonged at the time of the capture to a citizen of the United States. (See on pp. 140–141.)

No claim had been filed for the vessel, and she had consequently been condemned as enemy property by default.

And the question was whether this condemnation of the vessel as enemy property in the same suit in which the libel was filed against her, and the cargo, was conclusive of the facts against the claimant of the cargo.

Marshall, *C. J.*, delivering the opinion of the court, held that it was not, and on pp. 144 to 146 are found passages of his argument in which he examines the reasons why parties not represented are concluded by a decree of condemnation for the purpose of showing that the case before the court was not within them.

In Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600, 605, where Judge Story speaks of the effect of a sentence of admiralty and prize *in rem* as conclusive as to the title and property, and as to the facts on which the sentence professes to be founded, he is speaking of a sentence of condemnation, and in the meaning as above explained.

In Malley *v.* Shattuck, 3 Cr., 458, 488, Marshall, *Ch. J.*, delivering the opinion of the court, says: It is well known that a vessel libelled as enemy property is condemned as prize, if she act in such manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a

search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy property, however clearly it may be proved that the vessel is in truth the vessel of a friend. Of consequence, this sentence being only conclusive as to its own correctness, leaves the fact of real property open to investigation.

But there is nothing of authority in any of these cases, nor in any other, that a sentence of condemnation by a prize court, after its reversal by a Superior Court, is any evidence as to title or property, or as to the facts upon which it professes to be founded; nor that a sentence of acquittal and award of restitution or release is any evidence of title or property, or as to any particular fact as to title or other on which it is founded beyond the negation of any ground for condemnation appearing on the proofs.

The property in a vessel is not changed by a capture, nor without sentence of condemnation by a competent court.

Until a sentence of condemnation, it remains in the former owners.

Price *v.* Noble, 4 Taunt., 124–126.

The seizure and sale of a vessel by a neutral State, no sentence of condemnation by a competent court being shown, does not change the property.

Wilson *v.* Forster, 6 Taunt., 25.

And the condemnation of prize must be by a court of competent jurisdiction.

The familiar cases to this point are:

The Flad Oyen, 1 C. Rob., 140.
Havelock *v.* Rockwood, 8 T. R., 268.
Donaldson *v.* Thompson, 1 Cam., 429.
Smith *v.* Surridge, 4 Esp., 25.
The Kerlighett, 3 C. Rob., 99.

In 2 Wildman's International Law, 360, it is said that the end of the Prize Court is to suspend the property until condemnation.

It follows that there is nothing in the proceedings for the condemnation of the *Wren* after the burden of the condemnation in the District Court was removed by the reversal on the appeal, nor in the decree of reversal, nor in any particular fact upon which it proceeds, of estoppel against the assertion by or on behalf of Prioleau of his title to the proceeds acquired before the capture.

Fourth.—Reference to the course of proceedings in the Prize Courts will further elucidate the question in controversy.

In chapter X. of the Jurisdiction and Practice of Prize Courts, 2 Wildman's International Law, the proceedings in causes of prize in these courts are clearly stated.

On page 352, says this author: "By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize.

Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereon as prize in a Court of Admiralty, judging by the law of nations and treaties. The proper and regular court for these proceedings is the court of that State to which the captor belongs."

The evidence to acquit or condemn, with or without costs and damages, must, in the first instance, come merely from the ship taken, viz, the papers on board, and the examination, on oath, of the master and other principal officers, for which purpose there are officers of admiralty in all the considerable seaports of every maritime power at war, to examine the captain and other principal officers of every ship brought in as prize upon general and impartial interrogatories. If there do not appear, from them, ground to condemn, there must be an acquittal, unless, from the aforesaid evidence, the property shall appear so doubtful that it is reasonable to go into further proofs thereof."

On pages 367-369: "The only evidence that can regularly be produced in the first instance are the ship's papers and the preparatory examinations." * *

"When the ship's papers and depositions do not satisfy the court of the truth of the claim, further proof may be allowed."

On page 358: "Upon an appeal fresh evidence may be introduced, if, upon hearing, the lords of appeal should be of opinion that the case is of such doubt as that further proof ought to have been ordered by the court below."

Our practice is the same.

The *Dos Hermanos*, 2 Wheat., 76, and other cases.

It appears from the record that the *Wren* was tried and condemned in the district court as lawful prize of war upon the ship's papers and depositions of the master and crew taken *in preparatorio*, as it is called, without any order or requirement of further proofs, and upon these proofs alone, without requirement by the Supreme Court of, or order for, further proofs outside of these papers found on board, and the examination of the witnesses *in preparatorio*, the *Wren* was acquitted on appeal to the Supreme Court.

The court below condemned the *Wren* on its view of the sufficiency of these proofs, and the court above reversed that condemnation on its judgment of their insufficiency, without requiring further proofs, or remanding the case to the court below to take further proofs.

The ground of reversal was not that Laird was, in fact, the owner; but the true ground was, upon every just construction, the adjudged insufficiency of the proofs from ship's papers and *in preparatorio* to justify condemnation.

It may be conceded, that among these proofs was a certificate of registry of the ship, put on board when the *Wren* left Liverpool, outward bound, upon which Laird, a British subject, or his assigns, appeared to be the owner; and that the argument of the counsel and the court appear to have gone on the assumption from this document, and the further assumption, without further inquiry, or directing further proofs, that Laird continued to be the owner—that Laird was the owner at the time of the capture, notwithstanding the caution upon the document hereinafter referred to; but this was merely a part of the process or line of argument upon which the court reached its conclusion that there was no ground for condemnation of the ship.

Conceding, I say, for the sake of the argument, that all this

is so, the direct fact upon which the decree is founded is, that there was no ground for condemnation, and not the line of argument or process by which the ultimate conclusion was reached; all of which may have been mistaken, without affecting the validity or effect of the decree as a reversal of the decision below.

The decree, being final, was not and is not subject to review by the inferior courts or other courts upon the question of the rightfulness of the adjudication of reversal; and whether the court erred or not, or what the court might or would have done upon further proofs, are questions which were closed forever when the mandate of the Supreme Court was issued directing a reversal of the judgment of the court below and restoration to the claimant, and when that mandate was brought into the District Court of Florida, that court had no alternative but to take order to deliver the *Wren* or her proceeds to the claimant, to and for the use of the owner and proprietors of the *Wren*, without any obligation or right to determine or inquire who those owners or proprietors were.

Fifth.—There is no ground for imputation of want of good faith and fault by the district judge to Prioleau and the counsel employed on his behalf in not bringing the fact of his ownership to the notice of the District Court in Florida or of the Supreme Court which can affect his title.

The Englishman, Prioleau, of Liverpool, England, as the individual owner of the *Wren*, was less offensive to our courts than Laird, and not less a neutral by reason of his having been a member of the firm of Frazer, Trenholm & Co., if the fact were so.

The only evidence of it is on the cross-examination of Thomson, on p. 207, that he had known of Mr. Prioleau for many years by name as one of the firm of Frazer, Trenholm & Co.

If the fact were that Prioleau was a member of that firm, there was nothing in this fact to charge Prioleau, as the individual owner of this vessel, with any knowledge that it was at all material on any question of enemy property, or breach of

blockade, or to make it incumbent on the case, as presented, to bring that fact to the notice of either court, not in the District Court of Florida, even if he had been advised of the action of parties representing the United States in Havana, in planning a mutiny by a portion of the crew of his vessel, on a lawful voyage to Liverpool, her home port, to take her into Key West for condemation, as a prize of war, for private ends, after the victory was won and the rebellion put down, and had been cognizant of the proceedings in that court for her condemnation. But being at Liverpool, he knew nothing of the proceedings in the District Court of Florida, and after he learned of the condemnation in that court, and after an appeal, entered in the regular way, and in the prosecution of that appeal, on his behalf, by his counsel, upon the sufficiency of the proofs below, from ship's papers and examination *in preparatorio*, it was irrelevant, and it could only become material or pertinent on an order by the court for further outside proof as to actual ownership.

The case proceeding on the appeal upon the sufficiency of the proofs and papers from the ship and examinations of witnesses from the ship, without requirement of proofs from outside, whether the counsel employed by Foster & Thomson, on behalf of Priolean, in arguing from those proofs did or did not insist and submit to the court, that, according to his view of their purport, no one but Laird, a British subject, was the owner, is wholly immaterial, nor is it material that the judge who delivered the opinion, adopted the same line of argument.

The form of registry by Laird as the owner, of which the certificate was on board the *Wren* when seized by the mutinous crew, had a note at the foot, as follows:

"NOTE.—A certificate of registry granted under the Merchant Shipping Act, 1854, is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgage affecting the ship."

This note at the foot of a registry of a ship by a shipbuilder as the owner, is evidence of a proposed transfer of the ship, as opportunity might offer before the return voyage, and between

the certificate of registry with this note at the foot and the bill of sale to Prioleau, there is no opposition or repugnancy.

While the fact of Laird's business being that of a ship-builder, and his registy of the ship under that form of certificate with such notice, is strong confirmation that the sale to Prioleau was a real transaction, and not subject to any circumstances of suspicion, as is also evidenced by the circumstances of the registry of the ship by Prioleau as the owner, on receiving the bill of sale, 1st May, 1865.

This note at the foot of this certificate of registry, on board the *Wren*, and which was afterwards in the District Court of Florida, and before the Supreme Court, was a sufficient notice to put upon inquiry as to change of ownership to repel any imputation of want of good faith on the part of Prioleau, in not making special efforts to put his bill of sale on board the *Wren*, as evidence of his title before or on the voyage home, on which she was seized, and the war of the rebellion being then virtually at an end, there was nothing to require any special care in documenting the vessel; and this document being in possession of the District Court, and before the Supreme Court, is a further fact to repel any want of good faith in Prioleau, in not bringing his ownership before either court as an outside fact as a volunteer, if he had had the opportunity.

Good faith did not require him to co-operate as a volunteer to furnish the captors or their counsel with irrelevant and immaterial matter, or with relevant matter of whose materiality he was not chargeable with knowledge, or which was not called for.

Sixth.—The claimant, to whom restoration was to be made by peremptory order, in the mandate from the Supreme Court, was Edward C. Stiles, the master of the *Wren*, who, as master, was the representative of the vessel and all persons interested or concerned therein, whether as owner, mortgagee, insurer or otherwise, known or unknown, and who, on delivery of the *Wren*, or if sold, its proceeds to him as claimant, would be accountable to such parties, free from any inquisition by the

court as to the interest represented by him, or supervision by it, of his distribution of the proceeds in England.

See the Mandate, filed in D. C. of Florida, 13th April, 1869, foot p. 135, 136, referred to in findings on pp. 200–203.

In 2 Wildman's International Law, 355, is narrated the measures to be taken by the captor and by the neutral claimant upon a ship and cargo being brought in as prize.

After stating what is to be done by the captor and on the part of the neutral master of the cargo, he proceeds:

The master, correspondent or consul applies to a proctor, who prepares a claim, supported by the affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest therein.

And a little further on: If the claimant be dissatisfied with the sentence, his proctor enters an appeal, &c.

The statement in the claim of Edward Stiles, as master of the *Wren* (in findings on pp. 193–194), of the ownership of Laird, as inferred from the register, and his information and belief, is in conformity to the practice which requires a statement of his belief as to the ownership.

But this is not a defensive allegation upon which an issue is raised. The defensive allegation is in the denial that said steamer is a prize of war, which raises the issue upon which the cause is determined.

This statement of his belief that Laird was the owner was not essential, as showing an interest in the master to give him a standing as claimant, for the master may claim without having an interest.

Judge Betts, in his Admiralty Practice (p. 49), says: "An interest in the question, or even in the result of the cause, will not entitle a third person to intervene on the instance side of the court without his having also a subsisting interest in the

thing itself. A master of a ship may, however, intervene and claim on behalf of absent owners without having any personal interest in the vessel and cargo.

On page 74 he says, the existing interest in the subject necessary to entitle a party to become a claimant on the instance side of the court is not exacted in prize cases.

Neither has this statement of the interest of Laird any effect to limit the representation of the master, for in a proceeding *in rem* he is the representative of the ship—of the property—to whomsoever it belongs.

In Bradstreet *v.* Neptune Insurance Company, 3 Sumner, 610, Judge Story affirms the rule that the master is the proper representative of the *vessel* in proceedings *in rem* in the absence of the owner.

As the representative of the ship in proceedings *in rem*, the master is the immediate agent, and bound to act for the benefit of all concerned, whether as owners, insurers, mortgagees or others.

Croudson *v.* Leonard, 4 Cranch, 437.
The Mary, 9 Cranch, 145.

The master of a ship is responsible to the owners, and the owners are responsible for his acts within the scope of his authority as master.

Abbott on Shipping [167] to [169]; *ib.* [124] to [131].

To the real owner, whether registered, unregistered, or assigns of registered or unregistered.

Ib. [28] to [57].

For the extent of the representation and authority of the master in case of capture, see note 1 to [169], on p. 222 of Abbott on Shipping; with Story & Perkin's notes, Boston Ed., 1846.

In the American courts a master, agent or consignee may appear and recover, or claim and receive, restitution in his own name.

The agent of the owner may appear and recover, or claim and receive, restitution in his own name; the master of the ship may always appear in his capacity of agent for the owner.

In the American courts the agent of absent owners may appear either in his own name, as agent, or in the name of his principals, as he pleases.

Williams & Bruce, Admr. Practice, 199, note A.
Houseman *v.* The Cargo of the *North Carolina*, 15 Peters, 49.
McKinley *v.* Morris, 21 How., 355.
The Vaughan and Telegraph, 14 Wallace, 266.

The addition that Laird, a lawful British subject, is the true and *bona fide* owner of said steamer, and that no other person is the owner, as appears by the register of said steamer now in the possession of the court, and as he is informed and believes, is in conformity with the requirement of the rule of prize law, that the master must state his belief as to who the owners are.

It has no effect to limit his representation of the ship.

The first two paragraphs of this claim and answer constitute the claim, and the answer follows, denying that said steamer is a prize of war.

In Dunlap's Ad'y Practice, on page 159:

"The claim should be made by a party authorized to set up a defense against the libel. It should be made by the owner of the property, libelled or attached by the process of the court *or his agent*, or by the representative of any foreign government whose subjects may be interested in the property in question."

Ib., on p. 161: "The claim is frequently in practice united with an answer, and the proceeding is commonly called the claim and answer. This is not the most correct practice. The claim and the answer are distinct proceedings in a suit in admiralty. The object of the claim is to set up a right to defend the suit, and to offer an answer to the libel. The object of the answer is to set forth the grounds of defense after the claim has been admitted."

The decree of reversal by the Supreme Court not being an adjudication of the right of private property in the *Wren* or

its proceeds, but of acquittal only, and the character of the master, as claimant, being representative only, any order which the District Court might make in performance of its duty in obedience to the mandate of the Supreme Court to restore the proceeds of the *Wren* to such claimant or to any other person as claimant by his authority, and with his assent, as claimant, would not be an adjudication of the right of property in such claimant, and upon payment of the said proceeds to the substituted claimant in that character, it would leave the proceeds in his hands or in that of his agent's as money paid to him for the use of the party entitled in the same plight as in the hands of the original claimant.

Seventh.—The power of attorney, drawn by Foster & Thomson and procured by them through their client Prioleau from Laird and Stiles (15th finding, on pp. 197. 198), was an authority from Stiles to them to act as his agent, as claimant, to obtain restitution of the proceeds of the *Wren* in his name, as claimant or otherwise, and an authority from Laird to obtain restitution of the same proceeds in his name, as claimant or otherwise.

And it was a full power by Stiles to them to obtain such order as might be necessary for the payment to them of the proceeds of the *Wren*, but there is nothing in the power which contains any assertion or implication that Stiles was the owner, or that Laird was the owner, or that Foster & Thomson were to account for the proceeds of the *Wren*, when received, to either, as the owner or otherwise ; and the fact that this power was procured to be executed by Prioleau, as the owner, to Foster & Thomson, who were the attorneys of Prioleau, make it impossible to suppose that Foster & Thomson were to account to either Laird or Stiles for the money when collected and received, or to any other person than their client.

And there is nothing in the order or decree of the District Court of Florida, made on the 13th April, 1869, on filing the mandate of the Supreme Court, and this power of attorney from Stiles and Laird, in that court, for the payment to Laird,

as the claimant of the proceeds of the *Wren*, in substitution of Stiles as the claimant, and to Foster & Thomson, as his authorized attorneys in fact, which contain any assertion or implication that this money was the property of Laird, unless it can be maintained that the claim of acquittal, by the Supreme Court, was an adjudication that the *Wren* was the property of Laird at the time of the capture.

Eighth.—When the mandate was brought into the District Court of Florida, the only question of which this court had any jurisdiction in respect to the disposition of the proceeds of the *Wren*, or with which it had any concern, was to see to it that those proceeds were paid to the party to whom it was directed to make restitution by the mandate.

Ex. p. Siebald *v.* U. S., 12 Peters, 488.

Ex. p. Dubuque *v.* Pacific R. R., 1 Wall., 69.

And the court in its order for the disposition of these proceeds, did what it was authorized and required to do in this stage of the proceedings, on filing the mandate and said power of attorney.

Ninth.—The proceedings for discharge of the attachment in the suit commenced on the 28th December, 1868, by certain of the libellants in the District Court for the Southern District of Florida, and the transfer of the proceeds of the *Wren* to Foster & Thomson, in which Foster & Thomson were represented by Dockray, and J. Langdon Ward by Bethel, as detailed in the findings 17 to 29, were, with the co-operation of Mr. Ward, the proctor of the libellants, and under an arrangement between Mr. Ward and Foster & Thomson, with a view of transferring the litigation to New York, where it could be carried on by both parties more conveniently than in Florida. The condition in the arrangement proposed by Foster & Thomson, that they should keep the proceeds in their hands suffi-

ciently long to enable Ward to serve upon them any process or papers as he might be advised, was fulfilled.

See the condition in letters of Foster & Thomson of Feb, 24, 1869, in Division 21.

Its fulfillment, Div. 29.

In the fact that in the course of the negotiations which preceded the arrangement, Mr. Ward was in no manner given to understand that there was any ownership or claim of ownership of the fund other than such as appeared on the face of the record, and the power of attorney filed with the mandate, and that, in point of fact, he did not know or have any reason to believe that Foster & Thomson were acting in any other capacity than as attorneys for Laird and Stiles, representing their several interests as disclosed by the record in the Supreme Court (Division of Findings, 22), there was nothing that could affect the title of Prioleau to the funds in the hands of the garnishees as his attorneys.

Ward, as a lawyer, knew, or ought to have known, that the claimant, to whom restitution was ordered by the mandate of the Supreme Court, on its receipt might or would hold it as representative of the ship for account of whom it might concern, and Foster & Thomson was under no obligation to make a discovery in advance of the grounds of defense to proceedings by Ward on his proposed attachment of the funds as Laird's property.

Tenth.—There is no evidence that there was any controversy or claim by Laird of the proceeds of the *Wren* between him and Prioleau, after the transfer to the latter, nor any claim by Laird of these proceeds; and there is no correspondence in the circumstances of the case in the prize court with those in the case of De Mettou *v.* De Mello, 12 East., 234, cited by libellant's counsel. That case is therefore inapplicable. It is said by Judge Story that a concealment of facts would be a new head of law upon which to avoid a sentence

of condemnation or acquittal in case of a seizure and proceedings *in rem.*

Magoun *v.* New England Marine Insurance Company, 1 Story Reports, 157–167.

See the opinion of the Chief Justice in the Record on pp. 213, 214.

Eleventh.—The decree of the Circuit Court dismissing the garnishees from the proceedings, and adjudging and decreeing as therein in their favor, on the ground that the title of Prioleau to the *Wren*, vested in him by the bill of sale from Laird, was not divested by the decree of reversal in the prize suit, nor by subsequent proceedings, should be affirmed, with costs.

Twelfth.—It is according to the course of admiralty courts in admiralty proceedings to allow amendments to an answer in any stage of the action, and as well after as before an appeal, whenever the substantial merits and justice require it.

Dunlap's Ad'y Pr., ch. IX., pp. 211 and 214, and cases cited.

2 Conkling, U. S. Ad'y, 410–415.

The allowance by the Circuit Judge Johnson, allowed to stand by the Chief Justice, of the amendment to the answer of the garnishees, so as to admit evidence offered showing an extinguishment by the intervention of the United States Government and by treaty of the cause of action of the libellants upon which the attachments of the libellants were based, was within the power of the court.

It is in general true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not.

But if subsequent to the judgment, and before the decision of the appellate court, a case arises upon which it becomes the duty of the court to apply the obligation of a treaty, it cannot be excluded from the consideration of the court by the refusal of an amendment, without denying the obligation of the treaty.

See the *Peggy*, 1 Cranch, p. 40, of 3d Ed.
Martin *v.* Hunter's lessee, 1 Wh., at p. 371.
Yeaton v. The U. S. 5 Cranch 283

Thirteenth.—In Art. I. of the treaty between the United States and Great Britain, concluded May 8, 1871 (17 U. S. Statues—of Treaties, p. 67), after the recital:

Whereas, differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exists, growing out of the acts committed by the several vessels which have given rise to the claims generally known as the Alabama Claims.

And whereas, her Britannic Majesty has authorized her high commissioners and plenipotentiaries to express, in a friendly spirit, the regret felt by her Majesty's Government for the escape, under whatever circumstances, of the *Alabama*, and other vessels from British ports, and for the depredations committed by those vessels. In order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims, which are not admitted by her Britannic Majesty's Government, the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels, and generally known as the "*Alabama* claims," shall be referred to a tribunal of arbitration, to be appointed as therein provided, which was to meet (art. II.) at Geneva in Switzerland.

In Art. XI., the high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration, and of the Board of Assessors, should such board be appointed, as a full, perfect and final settlement of all the claims hereinbefore referred to; and further engage that every such claim, whether the same may or may not have been presented to the

notice of, made, preferred, or laid before the tribunal, or board, shall, from and after the conclusion of the proceedings of the tribunal or board, be considered and treated as finally settled, barred, and thenceforth inadmissible.

In the decision and award made by the tribunal of arbitration, constituted by virtue of the first article of the treaty concluded at Washington, the 8th of May, 1871, made and concluded at the Hotel de Ville, of Geneva, in Switzerland, the 14th day of September, 1872 (in vol. IV of papers relating to the treaty of Washington, 49 to 54), under the seal of the Department of State, the tribunal, making use of the authority conferred upon it by art. VII. of the treaty, by a majority of four votes to one, awards to the United States a sum of $15,500,000 in gold as the indemnity to be paid by Great Britain to the United States for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in art. VII. of the aforesaid treaty.

And in accordance with the terms of article XI. of the said treaty, the tribunal declares that all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly and finally settled.

The sum of money awarded to the United States by the Tribunal of Arbitration at Geneva, to be paid by Great Britain, was paid to the United States between March 3, 1873, and June 23, 1874. (See Act of March 3, 1873; 17 Stat., 601, and Act of June 23, 1874, *infra.*)

The libellants, citizens of Massachusetts, having caused their memorial and protest to be filed in the office of the Secretary of State on which they asked the intervention of the United States to obtain reparation from the Government of Great Britain for the same identical causes set forth in the libel in this suit as a claim against Laird, a British subject, and their claim, as filed, having been included among those presented by the agent of the United States to the tribunal of arbitration at Geneva, under the provisions of said treaty between the United States and Great Britain, by the express terms of article XI. of said treaty, the said cause of action in said libel alleged is to be considered and treated as finally settled, barred and thenceforth inadmissible.

By Act of Congress of June 23, 1874, entitled "An Act for the creation of a court for the adjudication and disposition of certain moneys received into the treasury under an award made by the tribunal of arbitration, constituted by virtue of the first article of the treaty concluded at Washington the eighth day of May, Anno Domini eighteen hundred and seventy-one, between the United States of America and the Queen of Great Britain" a court was constituted, to be known as the Court of Commissioners of Alabama Claims.

In or about the month of November, 1874, after the establishment by Congress of the Court of Alabama Claims, these libellants, or their legal representatives, presented to that tribunal their petition, in which they demanded judgment against the United States for $134,893.34, including value of ship ($115,869.50, less insurance, $30,000), $85,869.50, net freight, $44,094.33, and stores, $4,929.51, and afterwards such proceedings were had upon this petition that judgment was rendered against the United States for

Damages	$33,334 30
Interest	15,286 02
In all	$48,620 32

Which was paid in full October 19, 1877.

The settlement of these *Alabama* claims, including the claim of the libellants alleged in the libel, between the two Governments, put an end to any private right of claim against Great Britain, or any of its subjects, by the libellants, citizens of the United States; and the Government of the United States, by such settlement, assumed, as principal, the adjustment of the claim of the libellants alleged in the libel, and became itself solely responsible to them.

Under convention between the United States and Great Britain, of February 8, 1853, a joint commission was appointed to sit in London.

This convention provided for the adjustment of claims made upon the Government of the United States by corporations, companies and private individuals, subjects of her Britannic Majesty, and claims made upon the Government of Great Britain by corporations, companies and private individuals, citizens of the United States.

The jurisdiction of the commissoners extended to all cases remaining unsettled, which had been presented to either Government for its interposition with the other, since the signature of the Treaty of Peace, on the 24th December, 1814, and such other claims subsequent to that time as might be presented to the commissioners within six months from the day of their first meeting.

Alexander McLeod brought his claim before this commission for damages and expenses arising from his arrest, detention and trial in the State of New York, for acts done by the orders of the Canadian Government, in the destruction of the steamer *Caroline*.

The claims were rejected by reason of previous adjustment between the two Governments of the grounds of international controversy out of which they arose.

Judge Upham, commissioner appointed by the United States, with whom the umpire appointed under the convention agreed, laid down this principle: "A setlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claim of individuals arising under such controversies against the Government of the other country, unless they are especially excepted; as each Government by so doing assumes as principal the adjustment of the claims of its own citizens, and becomes itself solely responsible for them."

See proceedings and awards of the commissioners and umpire under the convention of Febrnary 8, 1853.

Washington Ed., 1856.
McLeod's case, 314–319, 320.
Senate Documents, 1st and 2d. Sess. 34th Congress, vol. 15, 1855–1856.

The passage in the opinion of Supreme Court, in the schooner *Peggie*, by Marshall, *C. J.*, where he says: "And if the nation has given up the vested rights of its citizens, it is not for the court but for the Government to consider whether it be a case proper for compensation," goes upon the concession and assumption of the same principle.

It is held, in cases referred to by libellant's counsel below, De Bode *vs.* The Queen, 13 Ad. & El., N. S., 364; Bustomjee

vs. The Queen, L. R. Q. B. Div., vol. 1, p. 487; S. C. in the Court of Appeals, 2 Q. B. Div., p. 69, Dec., 1876, that a Government adjusting or receiving compensation for the payment of the claims of its citizens, by reason of its sovereign power, can not be controlled by the coercive action of the courts in its use, application or distribution of money so received.

But there is nothing in this at variance with the principle that a settlement by the intervention of two Governments of private claims, refers the citizens of either to his own Government for compensation in extinguishment of his claims against the Government of the other, or its subjects.

The attachments served on the garnishee being based on and in enforcement of a cause of action alleged in the libel which has been extinguished by virtue of the settlement, under the treaty between the United States and Great Britain, can not for that reason be sustained, and on this, as an additional ground of defense, if otherwise sustainable, the attachments should be discharged and the garnishees dismissed from the proceedings.

For the binding obligation of a treaty, and the duty of the court to enforce it, where it affects the rights of parties litigating in it,

See the *Peggie*, 1 Cranch, 103, 3d ed., p. 1830, 37.
Martin *v.* Hunter, lessee, 1 Wh., at p. 371.
Foster *v.* Neilson, 2 Pet., 314.
1 Kent, 165 to 167.

It is clear, from the considerations which induced the conclusion of the Treaty of Washington, and the terms of the treaty, in which provision is made for the settlement of these Alabama claims, including those in question here, that what the United States Government intended to do, and what it did, was to assume the ownership of the private claims of its own citizens; so that when the settlement was made it was as effectual an extinguishment of the private claims, as to Great Britain and her subjects, as if released by the private owner.

See Argument, &c., of American Counsel at Geneva, pages 30 and 31.

The United States farther find as fact that the President, in his Annual Message to Congress immediately preceding the conclusion of the Treaty of Washington, and which, indeed, constituted the inducement thereto, spoke as follows:

* * * * * * *

"I therefore recommend to Congress to authorize the appointment of a commission to take proof of the amounts and the ownership of these several claims on notice to the representative of Her Majesty at Washington; and that authority be given for the settlement of these claims by the United States, *so that the Government shall have the ownership of the private claims*, as well as the responsible control of all the demands against Great Britain. It cannot be necessary to add that whenever Her Majesty's Government shall entertain a desire for a full and friendly adjustment of these claims the United States will enter upon their consideration with an earnest desire for a conclusion consistent with the honor and dignity of both nations."

V.—We, the counsel of the United States, insist, therefore, that such, in their magnitude, nature and scope, are the "claims" submitted to the tribunal by the express tenor, the spirit as well as the language, of the Treaty of Washington, as particularly set forth in the case and counter-case of the United States.

Also page 410:

"The tribunal, in order to give such complete indemnity to the United States, would have to take up and consider each one of the heads of claim set forth in the American case. These are—

(*a.*) The claims for private losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.

* * * * * * *

All these claims are, as we conceive, clearly comprehended in the positive terms of the treaty.

* * * * * * *

The treaty, in words of unmistakable universality, submits to

the tribunal *all differences, all claims, all questions, growing out of the acts of the cruisers under consideration.*"

Fourteenth.—It is submitted that the judgment in 197 should be affirmed, with costs.

FOSTER & THOMSON,
In pro. per.

C. VAN SANTVOORD,
A. J. VANDERPOEL,
Of Counsel.

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U. S. Supreme Court.

JOHN N. CUSHING, *et al.*,
Appellants,

vs.

JOHN LAIRD, the younger,

FOSTER & THOMSON,
Garnishees and Appellees.

No. 197.

JOHN N. CUSHING, *et al.*,
Appellees,

vs.

JOHN LAIRD, the younger,

FOSTER & THOMSON,
Garnishees and Appellants.

No. 388.

Further suggestions by counsel for garnishees :

First Point.

It is competent for the garnishees to show that the plaintiffs' rights against the respondent have been settled and discharged.

In *Thompson* vs. *Wallace*, 3 *Ala. R., New*

Series, 132, *Goldthwaite, J.*: "The judgment was discharged by the satisfaction of the execution, and no garnishee process could properly issue on it. The garnishee, when called in Court to show cause why judgment should not be had against him, is certainly at liberty to show by the record, if it was conceded that he could not do it in any other way, that the process has been improperly issued in consequence of the satisfaction of the judgment. This was shown in this case, and therefore, the garnishment was properly granted."

In *McEachin* vs. *Reid*, 40 *Ala.* (*N. S.*), 400, 412, *the Court says:* "A lien acquired by the service of garnishment, cannot, on principle, occupy a footing more favorable, than one acquired by the levy of an attachment. A judgment against a garnishee, is a judgment against the principal debtor. If the right does not exist to enforce the collection of the latter, it cannot exist to cover the payment of the former."

In *Washburn* vs. *N. Y. & Vermont, &c.*, 41 *Vermont*, 50, 55, *Pierpont, Ch. J.*, "The question then arises, can the trustees take advantage of the want of service on the principal defendant? Where the defendant appears in the suit, and submits himself to the jurisdiction of the Court, and does not see fit to avail himself of the want of service or defect in the form of the proceedings, he may be regarded as waiving his objections; a judgment against him would then be good and the trustees could not take advantage of such defect or want of service; but where there is no appearance of the principal defendant, and it is apparent, upon the face of the proceedings, that no judgment can legally be rendered against him, the trustee

may well insist that the whole proceedings should be dismissed. There can be no judgment against the trustee, unless there is first a judgment against the principal defendant, and where it is apparent that such judgment cannot be rendered, the trustee ought not to be kept in Court."

Drake on Attachment, 4 *Ed.*, 459, says: "The plaintiff's right to hold a garnishee existed only so long as, in the suit in which the garnishment takes place, he has a right to enforce his claim against the defendant. When his remedy against the latter is abandoned, so is his case against the garnishee. That the latter may show that the plaintiff's right against him has thus been terminated cannot be doubted. Thus, where one was garnished under an execution, he was permitted to show by a previous execution in the same case that the defendant had satisfied the judgment (*Thompson* vs. *Wallace*, 3 *Alabama*, 132; *Price* vs. *Higgins*, 1 *Littell.* 274). And where, by law, the death of a defendant, and the decree by the Probate Court of the insolvency of his estate, had the effect of dissolving an attachment levied on his property, it was held that the lien acquired by a garnishment was thereby likewise destroyed, and that as the judgment which might be obtained against the defendant's estate could not be coerced by execution, so none could issue on a judgment against the garnishee; and therefore, no judgment could be rendered against him."

See also *Drake on Attachment*, *sec.* 460.

Leigh vs. *Smith*, 5 *Ala.*, 583.
Lowry vs. *Clements*, 9 *Ala.*, 422.
Bostwick vs. *Beach*, 18 *Ala.*, 80.
Case vs. *Moore*, 21 *Ala.*, 758.

Caldwell vs. *Townsend*, 5 *Martin, N. S.*, 307.
Housemans vs. *Heilbron*, 23 *Geo.*, 186.
Rose vs. *Whaley*, 14 *Louisiana*, 374.
Collins vs. *Friend*, 21 *Louis.*, 7.
Roberts vs. *Barry*, 42 *Miss.*, 260.
Metcalf vs. Steel, 42 *Miss*, 511.
Washburn vs. *N. Y. & V. M. Co.*, 41 *Vermont*, 50.

"And the judgment against the defendant must be a final one. If appealed from by the defendant, there can be no judgment against the garnishee while the appeal is pending."

Emanuel vs. *Smith*, 38 *Geo.*, 602.

If suit abates, attachment falls with it.

Maxwell vs. *Lea*, 6 *Heisk.*, 247.

In *Gaines* vs. *Berrine*, 3 *Stew. & Port.* (*Alabama*), 114, *Judge Ormond says:* "There is no authority to render judgment against the garnishee upon his answer, until a judgment is obtained against the defendant in attachment, that being the only authority for condemning the money in the hands of the garnishee."

We submit that the rule of the common law Courts in this behalf is reasonable and right, and will be followed and adopted in this Court, unless it can be shown that an opposite rule exists in the Admiralty.

In the present case, we claim that it appears affirmatively upon the record, that no judgment can or could be rendered against Laird, except in violation of the treaty of 1871.

Second Point.

The facts presented to the Court, whether they be deemed as being presented to the Court under an amendment of the pleadings in the Circuit Court, or by way of motion or suggestion, show that there never was any cause of action against Mr. Laird, and that had there been an appearance on his part, and the facts presented to the Court in the original cause, no judgment could have been rendered against him.

See Lamar vs. *Brown*, 92 *U. S.* (2 *Otto*, 187, 199.
Jones vs. *Williams*, 41 *Tex.*, 390.
Smith vs. *Baazelton*, 1 *Heiskell's Ten. R.*, 44.
Cummings vs. *Diggs*, 1 *Heisk.*, 77.
Stoughton vs. *Taylor*, 2 *Payne, Cir. Ct. Rep.*, 655.
Meade Case, 2 *N. & Hunt.*, 224, 227, 247, 249.

The belligerency of the Alabama was acknowledged by the United States Government, even after her destruction, and as against her crew and officers. They were not punished as pirates or rovers, but were held in the same position as the Confederate forces on land.

Third Point.

If any cause of action ever existed in favor of libellants against Laird it was terminated by the treaty between the United States and Great Britain, ratified June 17th, 1871, and proclaimed July 4th, 1871. The treaty became from its ratification the supreme law of the land.

Our Constitution declares that such shall be its

force and effect; Ch. J. Marshall, says, (in *U. S.* vs. *Sch. Peggy*, 1 *Cranch.*, 109): "Of consequence its obligations on Courts of the United States must be admitted. * * * * * Where a treaty is the law of the land, and as such affects the rights of parties litigating in the Court, that treaty as much binds those rights, and is as much to be regarded as an Act of Congress."

1. To the treaty so entered into, every citizen of the United States was a party, and the records presented here, show that the owners of the Sonora was peculiarly parties to it. A claim had been presented on their behalf, in the regular way, to the State Department, demanding that idemnity be claimed from the British Government. This was the only constitutional channel in which indemnification could be secured.

   In reference to that claim thus filed we call attention to the language of Mr. John Quincy Adams, in his report on foreign relations.

   4 *State Papers*, *Foreign Rel.*, *p.* 704, "When a citizen appeals to his Government to seek and demand redress against a foreign notion, he thereby voluntarily makes his claim a subject of negotiation, and of those compromises in which all national adjustments of individual claims must and do always consist."

   And this we would supplement with the language of the Geneva Tribunal, which declares that "all the claims referred to in the treaty as submitted, are hereby fully, perfectly and finally settled, * * and each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, referred to, or laid before the tribunal,

shall henceforth be considered and treated as finally settled, barred and inadmissible."

2. Every claimant against a British subject for alleged wrongs coming within the provisions of the treaty, lost all individual right of action, and could only pursue his remedy in the manner thus prescribed by his Government, and from the time that the treaty was entered into and became effective in 1871, this action fell to the ground and could no longer be prosecuted.

   The original action against Mr. Laird, if there ever had been a cause of action against him, could not be prosecuted from that moment. High contracting parties had taken the matter in hand. The United States had demanded indemnity, and the moment that the two Governments, as contracting parties assumed jurisdiction, all private rights and all liabilities of individuals, whether citizens of the United States or subjects of Great Britain, ceased, and the matter became a subject for settlement by the Governments solely. Every claimant lost all individual right of action, and could only pursue his remedy in the manner prescribed by his Government.

3. No distinction can be maintained upon the theory that it was only a claim against the Government that was settled, and that private rights of action against private individuals for acts coming within the treaty were still left in force. The Government, when entering upon a treaty of this character, represents the rights and liabilities of each and every of its citizens as to matters coming within the treaty.

4. The English Government has made full compensation, and the libellants have received their award. Therefore, our proposition is entitled to the fullest possible force and effect. The denial of the libellant's right to recover here is sustained by the principles of justice. It was the duty of our Government, and it had the power to judge of the claim which the libellants had preferred and act upon it and secure its enforcement. The arbitrators did act upon it. They made an award and our Government received the indemnity, whether the money belonged to Laird or Prioleau, both, as English subjects, are entitled to the protection of the treaty. The garnishees are clearly not liable unless the Court has the right to take the money as Laird's, and pay it to the libellants.

5. The Court will not take the money from the garnishees, when, on demand of the British Government, our Government would be justly bound to immediately restore an equal amount to the English Government.

6. The questions thus presented are important to the whole world. If this action could be maintained, what would be the use of treaties between Governments for the benefit and protection of their citizens and subjects? Why should England come forward and take the responsibility off from Mr. Laird, if the treaty can be set aside or thus disregarded? What is to become of the commerce of the country if the owners of vessels now arriving from England, owned in whole or in part by persons who were subject to the charge of violating the laws of neutrality, could have their property attached at the suit

of private persons, when found within our jurisdiction ?

7. The case of the Baron de Bode (13th *Adol.* & *Ellis* (N. S), 383), discusses the effect of a treaty on private rights, and PARKE says : "When the French Government performed their part of the treaty, *all their liability to the individual British subject was at an end ;* every subject was bound by the treaty of his sovereign, in relation to France just as if he had been a party to it himself."

In the mixed commission growing out of the northwestern boundary difficulty, held in 1853, it is said that "such adjustments bar all claims of citizens of either country against the other, for individual damage sustained." Again, it is said by *Upham*, Commissioner : "The settlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claim of individuals arising under such controversies against the Government of the other country, unless they are especially excepted, *as each Government by so doing, assumes, as principal, the adjustment of the claims of its citizens, and becomes itself wholly responsible for them* * * * * These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that it was trusted, in Lord Ashburton's words 'that these truly unfortunate events might thenceforth be buried in oblivion.' The question then arises, what was the effect of this settlement on the private claims of any citizens of either country against the other."

The learned commissioner then discusses the right to make any such claims, and con-

cludes that to allow that would be contrary to the whole tenor and spirit of the settlement, and the international ground upon which it is placed, and adds: "In my view the entire controversy with all its incidents was then ended, and if the citizens of either Government had grievances to complain of, they could have redress only on their own Governments, who had acted as their principals, and taken the responsibility of making the whole matter an international affair, and had adjusted it on this basis."

See Phillimore on International Law, Vol. 3, p. 63.

So under the treaty of Washington, of 1861, England formally assumed the responsibility for the damage done by the cruisers in violation of neutral duty to our citizens. It must follow that any individual Englishman was at once relieved from responsibility, and that redress must thenceforth be sought against his Government alone.

Argument of American Counsel at Geneva, pages 30–31.

"The United States farther find as fact that the President in his annual message to Congress immediately preceding the conclusion of the treaty of Washington, and which indeed constituted the inducement thereto spoke as follows:

* * * * * *

"I therefore recommend to Congress to authorize the appointment of a commission to take proof of the amounts and the ownership of these several claims on notice to the representative of Her Majesty at Washing-

ton, and that authority be given for the settlement of these claims by the United States, *so that the Government shall have the ownership of the private claims*, as well as the responsible control of all the demands against Great Britain."

* * * * * *

Also page 440.

"The treaty, in words of unmistakable universality, submits to the tribunal *all differences, all claims, all questions growing out of the acts of the cruisers under consideration.*"

See Article 10 of Washington Treaty. Duty of assessors to hear counsel on each separate claim and make decision upon each claim in writing, &c.

Fourth Point.

Whether the award made by the commissioners and distributed by our Government was or was not sufficient to fully indemnify the Messrs. Cushing, no further claim can be made.

The Government had the right to surrender entirely and without compensation a claim of its citizen coming within the terms of the treaty.

Kent, in commenting upon the case of *Ware* vs. *Hilton* (3 *Dallas*, 190, 245), says: "So in the case of *Ware* vs. *Hilton*, it was said to be a clear principle of international law, that private rights might be sacrificed by treaty to secure the public safety, though the Government would be bound to make compensation and indemnity to the individuals whose rights have thus been surrendered." And Kent adds that "the power to alienate and the

duty to make compensation are both laid down by Grotius in equally explicit terms."

[*K. Com*, 167.]

A later case in point is *Little* vs. *Watson*, 32 *Maine*, 224. It was insisted on the argument (p. 217), that the plaintiff was entitled to the protection of the Constitution of the United States, which declares that private property shall not be taken for public uses without compensation. It was therefore urged that a clause in the treaty of Washington, of 1842, could not be enforced against private property.

Shepley, C. J., says: "It is further insisted that it (the treaty), cannot be permitted so to operate (*i. e.*, take plaintiff's title to land), and thereby defeat the title of the demandant to the land without a violation of that provision of the Constitution of the United States which declares that private property shall not be taken for public uses without compensation. It is not in the argument denied that public or private property may be sacrificed by treaty; but it is said that such a provision of a treaty as would take private property without compensation must remain inoperative or suspended until compensation has been made. Such a construction would infringe upon the treaty-making power, and make its acts depend, for their validity, upon the will of the Legislative department, while the Constitution provides that the treaties shall be the supreme law. The clause of the Constitution referred to is a restriction imposed upon the Legislative department, in its exercise of the right of eminent domain. It must, of necessity, have reference to that department which has the power to make compensation, and not to the treaty-making power which cannot do it. This provision of the Constitution will not prevent the operation of the treaty upon the grant of the tenant. (*Ware* vs. *Hilton*. 3 *Dal.*; *U. S* vs. *Peggy*, 1 *Cranch*. *The*

demandant must seek compensation for the loss of his land from the justice of his country.

Fifth Point.

As to the proposition suggested by the counsel for the libellants, that they have not received from the Government at Washington full compensation, we deem it answered by the suggestions in the preceding point—and would simply refer further to the case of

Kasson vs. *People*, 44 *Barb.*, 347.

The record shows that the libellants vuoluntarily submitted themselves to the jurisdiction of the Courts which distributed the money obtained from the British Government under the treaty, and obtained an award which was accepted and paid to them. If it was smaller than they hoped for it cannot be presented here as ground of complaint. It was the judgment of a Court into whose jurisdiction they voluntarily carried their grievance.

The payment by the United States was not, however, necessary to the termination of any claim against Laird. The terms of the treaty and its ratification ended the claim, even if not followed by award and payment.

Sixth Point.

Prioleau having the legal title, that title cannot be attached except in a suit against the garnishees, to which he was not a party. That can only be discussed in a suit to which Mr. Prioleau is a party, otherwise the garnishees might be liable to a double recovery.

The argument is well stated by Thornton,

J., in *Simpson* vs. *Tippin*, 9 *Ala.* (*N.S.*), 5 *Stew. & Port*, 208, 212: "An obvious difficulty presents itself in the attempt to litigate in this mode the question of fraud *vel non*, in the transfer of this obligation is, that the rights of the assignee would be determined in a contest in which he evidently could not be a party to the record, and in many cases could not even be notified to attend to the conduct of the litigation. Such would be the inevitable hardship upon him if the litigation thus conducted by one who cannot be *presumed* to know the facts of the case were held to be conclusive upon him ; and if the litigation were not held thus conclusive, then the fate of the innocent garnishee would he equally deplorable, for he might be subjected to a double recovery." And at p. 214, he says: "The manifest injustice which often ensues the administration of those (attachment) laws admonishes us not to extend them beyond their evident operation. The statute certainly authorizes a judgment against the defendant in attachment, under circumstances from which it would be rash, in many instances, to infer his knowledge of the proceedings ; but we do not feel authorized to give such construction to it as would involve incidentally in the same predicament his innocent assignee "

While, if Prioleau was before the Court as a party, the libellant might ask the Court to pass upon the relations of Laird and Prioleau, that cannot be done in this proceeding against Foster & Thomson. In any such case, if the assignment be in writing, and bear date before the attachment, and there be nothing to repel the presumption that it bears its true date, it will be effectual as against the attachment.

Sandige vs. *Graves*, 1 *Patton, Jr., and Heath*, 101.

Drake on Attachment, sec. 462: "It is an invariable rule, that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in a worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself. This is necessary, in order to protect the garnishee's rights, as between him and the defendant, and to enable the garnishee to defend a suit which the defendant might bring against him on the same liability for which he may have been held as garnishee."

This also shows the wisdom and necessity of the rule and principle that when the garnishees are called upon to answer interrogatories, and they disclose the fact that they have no assets of the respondent, and that the assets in their hands claimed to be his, belong to another, the proceedings should be dismissed as to them.

Otherwise they would be called upon to litigate with one who could give them no discharge, and be compelled to pay, and yet be liable to make a second payment to the respondent himself.

The law never intends to leave any person in that position.

The case of *Holmes* vs. *Remsen*, 20 *Johnson*, 229, determines nothing of the kind claimed for it by libellant's counsel, and nothing analogous thereto.

In that case there was no question between the garnishee and his principal.

In that case the assignees in bankruptcy of Mullett, in London, attached in the hands of Baring, Brothers & Co., a fund belonging to Clason, a New York debtor, and Baring Brothers did not and could not dispute the

ownership of Clason, and paid over the fund. Afterwards, assignees of Mullett's assets "not being, arising or growing within England," brought action against Clason's executors to recover the debt over again in this country.

The claim was, of course, defeated, because the amount had been compulsorily collected in England, out of Clason's funds.

See Central National vs. *Conn. Mu. Life*, 12 *Reporter*, 705.

Seventh Point.

The suggestions made by the counsel for libellants that the case must be treated as if the moneys were still in the U. S. Treasury, are wholly irrelevant.

While the moneys were in the treasury they were not subject to garnishee process.

1. The Judge of the District Court of Florida was not subject to the garnishee process.

He was only a disbursing agent, he was not the debtor of Mr. Laird.

No principle is better settled than that established in Buchanan *vs.* Alexander, 4 How. U. S. R., 20, to wit, that money in the treasury cannot be subjected to attachment, and that the government does not recognize the service of an attachment.

Judge McLean says:—"So long as the money remains in the hands of a disbursing officer, it is as much the money of the U. S. as if it had not been drawn from the treasury, until paid over by the agent of the

government to the person entitled to it, the fund cannot in any sense be considered a part of his effects. The purser is not the debtor of the seaman."

In this case, the Judge of the District Court was not the debtor of Laird or Prioleau.

The trial of a case in which the Judge was a garnishee, would have presented gross absurdities.

In Clark *vs.* Barrington, 11 Pick 260, payment of money by the town to the prudential committee, for the purpose of being paid over to the instructor, does not make the committee liable to the process of foreign attachment as the instructor's trustee, *nor discharge the town* from their liability to the instructor.

See also *Thayer* vs. *Tayler*, 5 *Allen*, 94.

The principle is further illustrated *Mechanics' and Traders' Bank* vs. *Hodge &c.*, 3 *Robinson*, (*La.*) *R.*, 373. Head note, "A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money (seized in his hands) under a *fi. fa.* as the property of a debtor. To condemn him to pay as an officer, would be to condemn the government, which cannot be done."

Thus finding that his attachment was of no avail, Mr. Cushing's counsel could only wait until the sub treasurer should pay the money.

Beside, to conduct a litigation in Florida was inconvenient for New York counsel.

It is easy, then, to see, that Mr. Ward and Mr. Thomson should desire that the money should be got out of the treasury. Mr. Thomson, as representing his client, wishing to get the money, and Mr. Ward wishing to have it placed where he can cause garnishee process to be served.

Mr. Ward has also entangled his proceedingr in Florida, by commencing two or more actions presumably for the owners of the "Sonora," but had erred in stating the names of the owners and different from the names of the plaintiffs in the New York action.

No property of any description can be attached in the hands of the government or its agents, unless where the agents make themselves personally liable.

Locke on Foreign Attachments, 46.
Gidley vs. *Lord Palmerston*, 3 *Brod. and Bing.*, 286.
McHeath vs. *Haldimand*, 3 *T. R.*, 172.
Unwin vs. *Wolsley*, *Id.*, 674.

In *Gidley* vs. *Lord Palmerston*, 3 *Brod. and B.*, 286 (7 *E. C. L. R.*): "An action does not lie against a public officer by individuals or sums, which, as a public officer, he is authorized to pay them, although he may have received the money applicable to that purpose. Held, therefore, that assumpsit does not lie against the secretary of war, by a retired clerk of the war office for his retired allowance, although the secretary of war had received the money applicable to such allowance."

See also *Taylor* vs. *Caryll*, 20 *How. U. S. R.*, 583.

Eighth Point.

The libellants, as garnisheeing creditors, can have no claim against the garnishees which Laird himself could not have against them.

1. Their rights are fixed by the actual facts as they existed at the time of the garnishment. The fact is found that Prioleau owned the moneys, and Foster and Thomson were Prioleau's agents and employees; and we therefore claim that when the money reached them it was just as much in *his* possession as it would have been when it reached his collector or cashier, or himself, in Liverpool.

Foster & Thomson never knew Laird, and never had any relations with him; their libellants, employers and client was Prioleau, and Prioleau alone.

If the libellants can take the money from Foster & Thomson, it is because Laird could take it from Prioleau, and, in fact, because Laird could have replevined the vessel itself from Prioleau, if it had been restored instead of its proceeds, and had come into Prioleau's possession.

If any acts or statements, or omissions to act or state, on the part of Foster & Thomson, could affect any rights or relations of Laird or the libellants as regards Foster & Thomson, these could not have been cured or remedied by the actual manual delivery of the currency by Foster & Thomson to Prioleau—so there is no distinction there.

Libellants' reasoning is that whether in the hands of Foster & Thomson or of Prioleau, the Court must deal with the case as if the money were in the hands of neither, but in the hands of the Florida Prize Court, or rather in the hands of the United States Assistant Treasurer, *in the City of New York.*

If it remained there, it was, of course, safely out of reach of any garnishee process of the libellants.

To draw it out within the reach of such process could only be accomplished by getting it into Foster & Thomson's hands. Dangers attended this course, but they must be risked.

A letter was agreed upon and passed. The terms of the letter may have been on Mr. Ward's part with a view to obtain, if not the money, at least a grievance against Foster & Thomson. The words of the letter, as relating to the power of attorney, as far as Foster and Thomson were concerned and intended, were clearly mere words of description, while they may have been intended by their adversary to be claimed as a *quasi* admission. In the arrangement, all was fair on the part of Foster & Thomson. Would Mr. Thomson, who knew the money to be Prioleau's, have purposely worded the letter so as to admit it to be Laird's, and that as to parties who were not in a position to impose any terms whatever, and who were absolutely harmless and powerless until the money was withdrawn from the protection of the Florida Prize Court, and the United States Treasury in New York

The money being, *in fact*, in New York, it certainly could not have been reached by any proceeding in Florida, and even if the suit there had not been imperfect in parties, and snarled and tangled up, so that it would have had to be abandoned any way.

The important and essential part of the letter was the part agreeing not to spirit away the money ; the residue was only preliminary, and leading up to that assurance.

2. When Laird received the £15,450 from Prioleau, the latter was entitled to use the name of the

former for all purposes for which it might be necessary, as concerned the protection and defence of the vessel.

There was no conflict of title between them.

If restitution were adjudged to Laird, it was restitution to Prioleau, as far as they two were concerned, and necessarily as concerned Laird's creditors, who could obtain nothing more than Laird himself was entitled to.

Laird was bound to furnish to Prioleau the power of attorney, which, along with Stiles, he did.

This power of attorney was joined in by Laird at Prioleau's request, upon suggestion of Foster & Thomson, simply that there should be no ground for cavil or suggestion by the Florida people, who seem to have been loath to let go hold of the money, even on the mandate of the Supreme Court. They did not even accede to the authority of the latter.

The power of attorney, coupled with an interest, was given before any attachment issued by the libellants, or any of them, anywhere, and being coupled with an interest (the actual sale of the steamer), was irrevocable and absolute—and thus actually covered all interest, if any had remained, by any kind of construction or theory, in Laird.

The doctrine of estoppel *inter partes* has no application in this case.

(*a.*) There was no mutuality.

(*b.*) Mr. Cushing had not parted with any property or right in anywise based on the judgment of the Prize Court.

3. The Dockray Matter.

Should Foster & Thomson, or Priorleau, be estopped, because Dockray entered a general appearance for Laird?

Dockray never had any relations with Laird or Priorleau. His only relations were with Foster & Thomson, and only by letter with them.

They forbade him entering any such appearance, and he deliberately violated their orders in that regard. He apologized afterwards, and explained his reasons, but the checks had been received and drawn before Foster & Thomson even knew of the entry of the appearance.

The suggestion that Foster & Thomson should have put back the money when they found he had entered the appearance, is about as reasonable and well considered as the residue of the libellant's propositions.

Where were they to put the money? How were they to get it back again? Consider the absurdity.

The entry of the appearance by Dockray was unnecessary and immaterial, and the exaction of it by Mr. Bethel was, as we think, a violation of faith and of his instructions.

1. The *Mandate* of the Supreme Court, by which alone it speaks authoritatively, directed the restitution to be made (as we contend) to *Stiles*.

Mr. Dockray could have compelled obedience to the mandate, by entry of a simple order in its own terms.

2. Mr Ward had already telegraphed to Mr. Bethel, to consent to Dockray getting the money *without condition* or stipulation.

3. All of the District Court order beyond the terms of the *mandate* was extra jurisdictional, and could bind and conclude nobody.

4. The Ward Matter.

Mr. Ward wanted to attach the fund, but found he could not do so in Florida, because

(*a.*) The fund not in Florida, but in the assistant treasurer's hands in New York.

(*b.*) It could not be attached in the possession of the District Court, nor in the hands of a Judge, or assistant treasurer, or any public officer.

(*c.*) The mandate of the Supreme Court had to be obeyed by delivery of the *money to Stiles*, and *any other* disposition of the money by the District Judge, under proceedings in his own Court, or otherwise, would have merited and obtained the discipline of the Supreme Court.

(*d.*) Mr. Ward's libels in Florida were all tangled up by mistakes as to names and interests of the libellants, and any further amendments would have allowed time for Mr. Dockray to have obtained the money by moving on the mandate.

To extricate himself from this predicament, Mr. Ward treated with Foster & Thomson to get the funds out of Court, out of the hands of a public officer, where it could not be attached, and into the hands of *unprivileged* individuals, where it could be attached. He was also successful in inducing Foster & Thomson to consent not to remove the funds to defeat any right to an attachment if he should be advised to attempt one.

The inducement to Foster & Thomson to have the fund here, was very much less forcible than the necessity which weighed upon Mr. Ward, and controlled him. They only wanted the money a step nearer home to Mr. Prioleau, and where they could manage any litigation themselves, instead of paying out fees in Florida.

Ninth Point.

AS TO THE TWO APPEALS.

The garnishees, out of abundant caution, took appeals from both the decrees of the District Court that there should not be thrown upon them the responsibility and risk of having to stand upon either one alone.

The Circuit Court held the decree entered last in point of time to be the final decree as to the interests of the garnishees.

The opinion of the Chief Justice (p. 207) is unanswerable upon this subject.

Upon such appeal the cause was held, and determined favorably for the garnishees, and the other appeal was dismissed.

Further, however, out of the same abundant caution, and that the discussion in this Court might not grow into one respecting the relative merits of said appeals, the garnishees took an appeal from such dismissal of the earliest appeal, the same being cause No. 388.

Upon the determination of the cause upon its merits in 197, No. 388, will have accomplished its intended purpose.

Tenth Point.

The judgment should be affirmed.

A. J. VANDERPOEL,
Of Counsel for Garnishees.

OFFICE SUPREME COURT U.S.
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FEB 25 1882
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BENJ. H. TYRREL, LAW PRINTER, 74 MAIDEN LANE.

U. S. Supreme Court.

No. 197.

JOHN N. CUSHING, *et al.*,
Appellants,

vs.

JOHN LAIRD THE YOUNGER.

FOSTER & THOMSON,
Garnishees and Appellees.

Special Brief on Treaty of Washington.

First.

The proposition that since the settlement effected by the Treaty of Washington, no action or suit can be maintained in the ordinary Courts of law by any citizen of the United States who sustained an injury by the act of the Confederate cruiser "Alabama," against any British subject concerned in the construction or equipment of that vessel, must be deemed indisputable upon established principles of international law, and the general usage of civilized States.

1. The settlement of the differences between the United States and Great Britain, in relation to the "Alabama" and the other Confederate cruisers, in and by the late Treaty of Washington, and the award

of the Tribunal of Arbitration constituted by the first article of that Treaty, released and relieved the private subjects of Great Britain from any and all personal responsibility which they may have ever incurred, in the ordinary Courts of law, whether of Great Britain or the United States, for their participation in the construction, equipment or dispatch of those vessels, or either of them, *precisely as they would have been if a settlement of the controversy between the two Governments in regard to those vessels had been effected by means of war and by a Treaty of Peace at the conclusion of a war between the two nations.*

It was a fundamental proposition on the part of the United States before the Tribunal of Arbitration, that the culpable and responsible default of the British Government in permitting, in violation of its neutral obligations, the equipment and dispatch of the "Alabama" and other Confederate cruisers in and from its jurisdiction, and in permitting those vessels to make use of its ports and waters as the base of naval operations against the United States, constituted *just cause of war*, and that by the Treaty of Washington, the United States consented to substitute for war indemnity by arbitration for the injuries sustained at the hands of the British Government.

The same consequences necessarily flow from the peaceful settlement of the differences between the two nations as respects the rights and liabilities both of the Governments themselves and their individual citizens and subjects, that would have attended a settlement effected by the adjudication of "*war—the terrible litigation of States.*" (3 *Phillimore Int. Law, p.* 2.)

The following striking passage, at the opening of the argument of the United States before the Geneva Tribunal, impressively sets forth the nature and magnitude of the controversy submitted to the great arbitration of that Tribunal:

"The course of the public correspondence be-

" tween the Governments of Great Britain and the
" United States, whether contemporaneous with or
" subsequent to the events to which it related, dis-
" closed so wide a difference in the estimates which
" the two Governments placed upon the rights and
" duties of satisfaction and indemnity for the in-
" juries the United States had suffered, and for
" which they were demanding redress from Great
" Britain, as to produce a situation of the greatest
" gravity and difficulty. Although it may be con-
" fidently hoped that the more general acceptance
" of the obligations of justice between nations has
" made it more and more difficult for two such
" Governments to find themselves in the necessity
" of appealing to the resort by which, as Vattel
" expresses it, 'a nation prosecutes its rights by
" force.' Yet, unappeased complaints of the mag-
" nitude and severity of those preferred by the
" United States against Great Britain do not easily
" pass into oblivion without some form of adjudi-
" cation. Whether or not, the resources of inter-
" national justice shall ever furnish to nations a
" compulsory tribunal of reason that will supersede
" what Lord Bacon calls 'the highest trials of
" right, when Princes and States that acknowledge
" no superior on earth, shall put themselves upon
" the justice of God for the deciding of their con-
" troversies by such success as it shall please Him
" to give on either side'; it has proved to be within
" the compass of public reason and justice of the
" two powerful, enlightened and kindred nations,
" parties to this great controversy, to subtract it
" from the adjudication of 'war—the terrible liti-
" gation of states.' By amicable negotiations
" which have produced the treaty of Washington,
" the high contracting parties have reduced their
" differences to a formal and definite expression
" and description of the claims for satisfaction and
" indemnity by Great Britain which the United
" States insist upon, and that nation contests, and

"have submitted to the award of this august tri-
"bunal the final detetermination of the same."

The theory on the part of the British Government before the Tribunal of Arbitration that the settlement devised by the Treaty of Washington was and was to be regarded as an "*amicable settlement*" of the differences in which the treaty originated was strenuously and even indignantly repudiated by the representatives of the United States in their argument and proceedings before the tribunal, and they contended and maintained throughout that the agreement to submit the grave questions to arbitration referred to that tribunal took the place of war, and that the treaty was to be interpreted, and given effect in the light of that paramount consideration.

The fundamental proposition on the part of the United States, before the Geneva Tribunal is stated in the following passage in the argument of their distinguished counsel :

"The acts of commission or omission charged to
"the British Government in the premises *constitut-*
"*ed due cause of war.* On abstaining from war and
"consenting to substitute *indemnity by arbitration*
"for wrongs suffered by the United States at the
"hands of Great Britain, the United States are
"entitled to redress in damages general and par-
"ticular, national and individual, coextensive with
"the *cause of war*, that is to say, sufficient to
"constitute real indemnification for all the injuries
"suffered by the United States.

"The Tribunal in order to give such complete
"indemnity to the United States, would have to
"take up and consider each one of the heads of
"claim set forth in the American case.

"These are :

"(*a.*) The claims for private losses growing out
"of the destruction of vessels and cargoes by the
"insurgent cruisers.

"(*b.*) The national expenditures in pursuit of
"those cruisers.

"(*c.*) The loss in the transfer of the American "Commercial Marine to the British flag.

"(*d.*) The enhanced payments of insurance by "private persons.

"(*e.*) The prolongation of the war, and the addi- "tion of a large sum to the cost of the war and of "the suppression of the Rebellion.

"All these claims are, as we conceive, clearly "comprehended in the positive terms of the "treaty."

Argument of the U. S., 3 *Geneva Arbitration, p.* 187.

The learned counsel further say :

"Her (Great Britain's) acts of actual or construc- "tive complicity with the Confederates gave to the "United States the same *right of war* against her "as, in similar circumstances, she asserted against "the Netherlands. *We, the United States, hold- "ing those rights of war, have relinquished them "to accept instead the arbitration of this Tribunal "and the arbitration substitutes correlative legal "damages in place of the right of war.*" (Ibid, p. 218.)

Again it was said :

"That the instruments of the injury done were "the cruisers and their officers and crews, is imma- "terial to the question. Responsibility for the "acts of those cruisers, by the very terms of the "treaty is imposed on Great Britain, if she be "found in fault according to the agreed rules.

"If it were otherwise, then no responsibility "could ever devolve on any Government for "breaches of neutrality produced by its neglect ; "for the Government is not *in its own person the "actual cruiser* which sinks and burns ; it is how- "ever, the *constructive captor* by the spirit and "the letter of the treaty. The common sense of "mankind oversteps all such immaterial incidents,

"and goes direct to the prime *author* of the "wrong, the Government, which *wrongfully did* "*or wrongfully permitted the act impugned, the* "*expedition from her ports of the floating for-* "*tress as the counter case properly calls the wrong-* "*ful instrument of the guilty Government.*"

Ibid, *p.* 217.

Referring to the contention on the part of Great Britain, that the treaty was an "amicable stttlement" of the controversy, the counsel said:

"It is not an amicable settlement; it is not in "any sense a settlement to engage in a protracted "lawsuit, as the two governments have been con- "strained to do, in consequence of the British "Government refusing to enter into the amicable "arrangement proposed by the United States. "After rejecting the 'amicable settlement' pro- "posed by the American Commissioners, the Brit- "ish Commissioners next proposed a litigious "'mode of settlement' in its place, viz: a lawsuit "or arbitration, wherein all liability to the United "States for the injuries complained of should be "denied and contested. The American Commis- "sioners regarded this as a very different adjust- "ment from the one which they had proposed. "They unwillingly and under conditions accepted "the British suggestion to refer to arbitration the "full statement of injuries which they had just "made, and which the British Commissioners had "received without cavil."

Ibid, 200.

The agent of the United States, in his letter to Mr. Fish, of September 21, 1872, transmitting the award of the Tribunal, and giving an account of the principles adopted in the preparation of the case of the United States, states, as one of the cardinal theories of the Government, "that the Tri- "bunal of Arbitration was a judicial body, *sub-* "*stituted by the parties to take the place of force*,

"*and empowered to try and determine issues* "*which otherwise could be settled (if at all) only* "*by war.*"

4 *Geneva Tribunal, p.* 2.

Upon this presentation of the character of the differences between the two nations, and the purpose and effect of the treaty by which they were submitted to arbitra- "tion, the Tribunal, as is well known, at its ses- "sion on the 19th of June, 1872, determined in re- "spect to the claims presented by the United States "for the award of the Tribunal, for 1st. The "losses in the transfer of the American commer- "cial marine to the British flag. 2d. The enhanced "payments of insurance, and 3d. The prolong- "ation of the war, and the addition of a large sum "to the cost of the war, and the suppression of the "rebellion, that those claims did not constitute "upon the principles of international law appli- "cable to such cases, good foundation for an "award of compensation or computation of dam- "ages between nations and, should, upon such "principles, be wholly excluded from the consid- "eration of the Tribunal in making its award."

4 *Geneva Arbitration, p.* 20.

This declaration was accepted by the President of the United States as determinative of the important question of public law involved, and the United States stated that the so-called "indirect claims" would not be further insisted upon before the Tribunal, and might be excluded from all consideration in any award that might be made.

Ibid. p. 21.

By its final decision and award, the Tribunal judged with respect to the "Alabama" that Great Britain failed to use due diligence in the performance of its neutral obligations, and failed by omission, to fulfill the duties prescribed in the first

and third rules established by the VI Article of the Treaty of Washington, and after determining the liability of Great Britain in respect to the other vessels inculpated by the United States, and rejecting the claim for the cost of pursuit of the Confederate cruisers, awarded to the United States a sum of $15,500,000 in gold "as the indemnity to "be paid by Great Britain to the United States for "the satisfaction of all the claims referred to the "consideration of the Tribunal, conformably to "the provisions contained in Article VII of the "Treaty."

4 *Geneva Arbitration, p.* 53.

By that award and its payment, the United States received the full amount of the pecuniary indemnity to which they were justly entitled, under the principles of the law of nations, applicable to such cases for the injury sustained by reason of the acts of the liege subjects of Great Britain, in constructing, equipping and despatching the "Alabama," and the acts and defaults of the British Government in relation to that vessel, in violation of the international obligations of Great Britain toward the United States during the rebellion and which constituted, as maintained by the United States, just cause of war between the two nations.

2. The treaty of Washington having thus substituted *arbitration* for *war*, as the means of redress for the injuries suffered by the United States in connection with the Confederate cruisers, and which constituted, in the judgment of the Government of the United States, just cause of war, the effect of the settlement thus accomplished must be deemed, according to the principles of the law of nations, the same as if it had been brought about at the conclusion of hostilities by a treaty of peace between the two nations.

3. No publicist can doubt that if the United

States had gone to war with Great Britain on account of the complaints and injuries which constituted the basis of the "Alabama claims," a treaty of peace would have thrown all such complaints and injuries into *oblivion*, and operated to prevent them from being made the subject of a suit or action on the part either of the United States or any of their citizens against any subject of Great Britain, in the ordinary tribunal of either nation.

All the authorities on the law of nations declare the principle, that the effect of a treaty of peace is to *abolish* all claims for injuries which gave rise to the war, or formed any part of the reasons for undertaking it, and to throw them into *oblivion* by the *amnesty* necessarily implied, if not expressed, in the treaty.

Vattel, Bk. IV., Chap. II., § 19.
Wheaton Int. Law, Part IV.. Chap. IV.
3 *Phillimore Int. Law*, 736.
1 *Wildman Int. Law*, 140.
Halleck Int. Law, 852.

"A treaty of peace operates as a release of all "wrongs and a settlement of all differences to "which it relates. It is an agreement to waive all "discussion concerning the respective rights of "the parties, and to *bury in oblivion* all the orig- "inal causes of the war."

Wildman. Int. Law, p. 140.

Hall in his recent work states the principle with great clearness thus :

"A Treaty of Peace puts an end to all preten- "sions, and *draws a veil over all quarrels out of* " *which the war has arisen.*

"It has set up a new order of things which forms "a fresh starting point, and behind which neither "State may look."

Hall. International Law, p. 486.

Neither the Government nor its subjects can ever afterward be called to account in any form or in any Tribunal, for any acts or defaults which constituted the original cause of the war.

4. The *amnesty* which would have been necessarily implied if it had not been expressed in the Treaty of Washington, is, in fact, declared in express terms in the 11th article, which proclaims that all claims referred to in the Treaty as submitted to the Tribunal, are, by its award, fully, perfectly and finally settled.

Second.

But, independently of the special and peculiar considerations which have been presented as applicable to the settlement of the "Alabama Claims" by the Treaty of Washington, it must be deemed to be a general principle of public law, that where a Government has been held responsible, by another state, for the act of its individual subjects or citizens, and has made amends for them by pecuniary reparation or otherwise, the individuals concerned are exempt from all liability as private trespassers, and their acts are no longer the subject of inquiry in the ordinary Courts of law.

1. The case is not distinguishable in principle from that of trespasses, or torts, by officers, agents or private subjects of a State, originally *authorized* or directly *permitted* by its Government, or the case of such acts not originally authorized but subsequently *ratified* by the Government of the State.

In both such cases, it is well settled that the private individuals cannot be made personally answerable in the ordinary municipal tribunals for their acts.

The case of Alexander McLeod, discussed between Mr. Webster and Mr. Fox, in 1841, involved the question of the liability of McLeod to answer as for a private offence or tort, in the Courts of this country, for his participation in the attack on the "Caroline" after the British Government avowed its responsibility for that transaction.

Mr Webster in his letter to the British Minister said :

"The Government of the United States enter-
" tains no doubt, that after this avowal of the
" transaction as a public transaction, authorized
" and undertaken by the British authorities, indi-
" viduals concerned in it ought not by the princi
" ples of public law, and the general usage of civ-
" ilized States to be holden personally responsible
" in the ordinary tribunals of law for their partici-
" pation in it."

6 *Webster's Works, p.* 203.

The opinion of Mr. Webster was concurred in by the leading jurists of that day. (26 *Wendell Appendix. Paper of Judge Talmadge on decision of Supreme Court of New York, in McLeod's case.*)

The President, in accordance with the view expressed by Mr. Webster, instructed the Attorney General to intervene on behalf of McLeod in the proceedings instituted in New York, and in his letter to Mr. Crittenden transmitting the President's instruction, Mr. Webster said :

"All that is intended to be said at present is
" that since the attack on the 'Caroline' is avowed
" as a national act, which may justify reprisals, or
" even general war, if the Government of the United
" States, in the judgment which it shall form of
" the transaction and of its own duty, should see
" fit to so to decide, yet that it raises a question
" entirely public and political, a question between
" independent nations, and that individuals con-
" cerned in it cannot be arrested and tried before

"the ordinary tribunals, as for the violation of "municipal law. If the attack on the 'Caroline' "was unjustifiable, as this Government has assert- "ed, the law which has been violated, is the law "of nations, and the redress which is to be sought "is the redress authorized in such cases by the "provisions of that code."

6 *Webster's Works*, 264.

Mr. Webster applied the same doctrine to the *civil suit* instituted against McLeod by the owners of the "Caroline," the vessel destroyed by him, and said that whether the process be *criminal* or *civil*, he could not be held liable in the Courts of the United States, or of the States of the Union, on account of his participation in that transaction. His words are: "*It is understood that Alexan- "der McLeod is holden as well on civil as on crim- "inal process for acts alleged to have been done "by him in the attack on the 'Caroline' and his "defence or ground of acquittal must be the same "in both cases.*"

Letter to Mr. Fox, 6 *Web.*, 252.

The case of *Buron vs. Denman*, 2 *Exchequer*, 188, involved the question whether or not a British officer was personally liable to a Spanish subject for a trespass to his property on the coast of Africa, after the British Government had ratified the tort.

The Court held that after the ratification the British subject was exempted from legal liability for his act and that the Government was alone responsible for the injury.

Baron Parke said:

"If an individual ratifies an act done on his be- "half, the nature of the act remains unchanged; "it is still a mere trespass, and the party injured "has his option to sue either.

"*If the Crown ratifies an act the character of*

"*the Act becomes altered, for the ratification does*
"*not give the party injured the double option of*
"*bringing his action against the agent who com-*
"*mitted the trespass or the principal who ratified*
"*it, but a remedy against the Crown only (such as*
"*it is) and actually exempts from all liability the*
"*person who commits the trespass.*

"Whether the remedy against the Crown is to
"be pursued by petition of right, or whether the
"injury is an Act of State without remedy, except
"by appeal to the justice of the State which in-
"flicts it, or by application of the individual suf-
"fering to the Government of his country, to in-
"sist upon compensation from the Government of
"this—*in either view the wrong is no longer action-*
"*able.*"

3. The principal involved in these decisions is equally applicable to the case of acts on the part of subjects of a State, for which its government is internationally responsible, after such responsibility has been admitted, or duly adjudicated and there also *the liability of the individuals is merged and absorbed in that of the nation to which they belong just as if the Government had originally authorized or expressly ratified the acts.*

4. The doctrine of the United States before the Geneva Tribunal was that: "The pretended neu-
"tral who, as a Government expedites vessels, or
"with culpable negligence, permits the expedition
"of vessels from its ports, to cruise against one of
"the belligerents, *becomes thereby belligerent in*
"*fact and responsible as such to the injured bel-*
"*ligerent.*"

Argument of U. S., 3 *Geneva Tribunal, p.* 23.

Such being the position of the British Government in the transaction of the equipment and dispatch of the "Alabama," as adjudicated by the

Geneva Tribúnal, no British subject can be held responsible in any Court of the United States, for this belligerency of his Government, any more than after a war between two nations, a subject of one of them can be sued in the Courts of the other for his participation in the hostilities.

5. The only doctrine in harmony with the settled principles of modern public law, and the usage of civilized States is, that the judgment of the Tribunal of Arbitration under the Treaty of Washington, affecting Great Britain with responsibility for the acts of the Lairds in regard to the "Alabama," operated to exempt them from any suit in the ordinary courts of justice to the same extent as if Great Britain had originally authorized their acts or had subsequently expressly ratified them.

Third.

The Lairds, as builders of the "Alabama," under contract with the Confederate Government, cannot be called to account, civilly or criminally, in the tribunal of the United States for their acts in connection with that vessel, any more than the officers of the army or navy of either of the belligerents are liable in those Courts for their acts of warfare during the period of hostilities.

Dow vs. *Johnson*, 100 *U. S. R.*, 169.

J. HUBLEY ASHTON,
Of Counsel for Garnishees.

U. S. Supreme Court.

J. P. Giraud Foster and James Thomson, Garnishees,
Appellants,
vs.
John N. Cushing, *et al.*,
Appellees.

No. 388.

BRIEF FOR APPELLEES.

Facts.

The facts necessary to be considered by this Court in the determination of the only question involved in the appeal in this case (which is only a question of practice) are as follows:

The libellants having filed their libel, obtained process with a clause of foreign attachment against funds in the hands of Foster & Thomson, garnishees. The process having been served, the garnishees appeared in answer to it, and, after some motions as to the process, (which may be passed over, as no point is made on them by the garnishees) filed their answer denying that they had in their possession any funds of the defendant. (Record in No. 197, p. 20.) On this answer the issue was tried before the District Court, and on the 26th day of April, 1873, that Court made an interlocutory decree in favor of the libellants. This decree is found in the record in No. 197, on p. 168.

The garnishees served notice of appeal from this interlocutory decree to the Circuit Court.

When that appeal came on for hearing, the libellants moved to dismiss the appeal. They had made such a motion twice before in the cause—once before Judge Woodruff, who postponed the determination of the motion till the hearing of the cause (which he did not live to hear), and again before Judge Johnson, who postponed its determination till the decision of the cause (which he did not live to decide). The motion made before the Chief Justice was not decided by him until the final decision of the cause on the other appeal, which had been taken by the garnishees, and which is No. 197. He then granted the motion of the libellants to dismiss the appeal from the decree of April 26th, and, in his decree, dismissed the same, and gave a decree against the garnishees for costs. (Record in No. 197, p. 258). And from this decree, dismissing their appeal to the Circuit Court, the garnishees have taken this appeal to the Supreme Court.

Points.

First.—The garnishees have presented no separate brief or separate argument in this case. They have merely embodied in their briefs in No. 197 some suggestions in reference to this appeal.

Second.—In the brief of Mr. Van Santvoord (pp. 2 and 3), is contained what seems to us to be an erroneous statement, in reference to this appeal, which error is also repeated in the assignment of error on p. 15. This appeal is spoken of as being an appeal "from the decree of the District Court, *and the order made thereon of April* 26, 1873." But, as we understand it, the appeal was taken from the interlocutory

decree made on the 26th of April, 1873, and no appeal was taken from the final decree, which is spoken of by Mr. Van Santvoord as an *order.*

a.—The notice of appeal on p. 2 of the record in this case fixes this matter. It gives notice that the garnishees appeal from "the final decree of this Court, entered on the 26th day of April, 1873, *adjudging and decreeing that they, the garnishees, had in their hands, at the time of the levy of the attachments herein, credits and effects of the said John Laird, the younger, proceeds of the Steamer Wren.*"

b.—The decree, which so adjudged and decreed, is the first decree entered on the 26th of April, 1873, and no other.

c.—No notice of appeal from any other decree than that one has ever been served.

Third.—The final decree in this matter against the garnishees, from which alone they could appeal to the Circuit Court, was not the decree specified in their notice of appeal, but the decree ordering them to *pay into Court* the sum of $31,441.62, or give stipulation "to abide the further order or decree of this Court in relation thereto."

a. The proceedings against garnishees, on the process of foreign attachment in Admiralty, are governed by the 37th Admiralty Rule of the Supreme Court, and the Rules of the District Court Nos. 29 and 31.

b. These rules provide for an answer by the garnishees on oath as to the property, credits and effects of the defendant in their hands.

On this answer there is of course to be a hearing, if it denies the possession of any property, credits or effects of the defendant. When that hearing is had, and the Court

on that hearing has determined that the garnishees have such property, or credits and effects, the case then stands as if the garnishees by their answer had admitted the possession.

And then, in accordance with District Court Rule 29, "on motion of the actor," the garnishees must pay into Court the money which they may be "ordered by the Court" to pay, "or give stipulation to abide the further order or decree of the Court in relation thereto."

This last decree that the garnishees pay the money into Court or give the stipulation, is the final decree as to the garnishees. The proceeding as to them on the attachment is then terminated. If they pay the money into Court they have no further concern with it. If they give the stipulation, their liability is thenceforth on their stipulation.

c. Now if the garnishees desire to appeal on the question whether they have in their possession funds belonging to the defendant, the principle which must govern that appeal ought to be the same one which governs all appeals, viz., that they must appeal from that decree of the Court which is *final* against them. And the final decree against them must be the decree that they pay the money into Court; for that is the object and end of the proceeding against them.

As against a defendant the final decree is that he pay the sum fixed in the decree to the libellant. So, against garnishees, the final decree is that they pay the sum, determined by the Court to be the property of the defendant in their hands, into Court.

Such a decree was made by the District Court in this case, and from that decree they did not appeal. But, considering the decree, which determined that the funds which they had in their hands were the property of Laird, to be the final decree, they took their appeal from that decree, which was only the interlocutory decree—the decree which

declared the right, not the decree which directed the payment.

Fourth.—There is no authority on this precise question to be found in the books.

There is but one case, so far as we have found, of an appeal by garnishees in the Admiralty, the case of *McLoon* vs. *Linquist* (2 Ben., 9).

And that case throws no light on this question.

But the analogy is plain between the ordinary practice in all Admiralty cases, and this for which we argue. It is the usual practice to make an interlocutory decree, which fixes the right, and then, after any other proceedings which are necessary, to make a final decree directing the respondents to pay the amount decreed to the libellant. This latter decree is the one to be appealed from, never the former.

The "Yuba," 4 Blatch., 314.
Harris *vs.* Wheeler, 8 Id., 81.

So in the Circuit Court it is common practice to enter a decree simply affirming the decree below; but such a decree is held to be interlocutory merely, and not appealable.

The Palmyra, 10 Wheat., 502.
Montgomery *vs.* Anderson, 18 How., 386.
Mordecai *vs.* Lindsay, 19 Id., 199.
Wheeler *vs.* Harris, 13 Wall., 51.

Fifth.—The decision of the Circuit Court, dismissing this appeal, was therefore correct. To use the language of the opinion of the Chief Justice, "the decision that the fund in the hands of the garnishees belonged to Laird was interlocutory only. It settled the title to the fund for the purposes of the suit, but did not adjudge that it be paid to the libellants." We add, that neither did it adjudge that it be paid into Court.

This reasoning is conclusive. We find no suggestion in the brief of either counsel of any argument against it. Because it did not so adjudge, it was interlocutory, and therefore the appeal of the garnishees from it was rightly dismissed.

J. LANGDON WARD,
Proctor for Appellees.

R. D. BENEDICT,
Advocate.